

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL
WITH PROOF
OF SERVICE

76-1034

B
P/S

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HARRY D. IACONETTI,

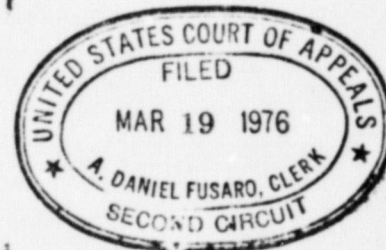
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S APPENDIX

LEON DICKER
Attorney for Defendant-Appellant
400 Madison Avenue
New York, N. Y. 10017

DAVID G. TRAGER
United States Attorney, Eastern District of New York
Attorney for Plaintiff-Appellee
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York



(5376)

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DOCKET ENTRIES

D. C. Form No. 100

CRIMINAL DOCKET

75 CR 277

WEINSTEIN, J.

TITLE OF CASE

ATTORNEYS

THE UNITED STATES

For U. S.: R. Dearie

vs.

HARRY DOMINICK IACONETTI

CLOSED

For Defendant:

Leon Dicker

400 Madison Ave. NYC.
421-3400

Bribery & Extortion (to delay movement of articles in commerce)

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,		1-12-76	Notice of Appeal	5 -	
Clerk,		1-13-76	Paid to Trial		5 -
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses,					

DATE	PROCEEDINGS
✓ 4-8-75	Before Weinstein J - Indictment filed.
✓ 4/10/75	Copy of Notice received from Govt and filed that case will be called for pleading on 4/18/75 at 9:30 A.M.
4-18-75	Before WEINSTEIN J - case called - deft & counsel Leon Dicker present - deft arraigned and enters a plea of not guilty - pre-trial conference held and concluded - deft U.R. - trial set for May 22, 1975 at 9:30 am.
✓ 4-18-75	Govts Notice of Readiness for Trial filed
✓ 4/24/75	Copy of Letter to Leon Dicker, Esq. from A.U.S.A. Dearie filed re:satisfaction on request for certain documents
✓ 4/25/75	Copy of Letter to A.U.S.A. Dearie from Leon Dicker dated 4/23/75 filed

DATE	PROCEEDINGS
5-12-75	Notice of Motion filed, ret. May 22, 1975, for Bill of Particulars, for dismissal, suppression, etc.
5-19-75	Before WEINSTEIN, J.- Case called- Motion to adjourn trial date, etc. argued granted- deft waives right to a speedy trial-trial adjd to 6/14/75 at 9:45 A.M. for trial
5-22-75	Before WEINSTEIN J - case called & adjd to June 16, 1975 (for trial) and for dismissal of the Indictment.
5-30-75	Copy of Letter to Judge Watson from Leon Dicker dated 5/28/75 filed
6-2-75	Before WATSON J - case called - trial set down for June 16, 1975 at 9:30 am.
6-16-75	Before WEINSTEIN, J.- Case called- Case transferred to Judge Watson
6-16-75	Before WATSON, J.- Case called- Deft's atty present-Deft's motion for inspection of grand jury minutes-decision reserved- Deft's motion to dismiss indictment for failure to state fact to constitute an offense-decision reserved0 Deft's motion to dismiss indictment on grounds of prejudice of deft's right denied- deft's motion to suppress recordings-denied- deft's motion to suppress recordings denied- On motion of deft trial adjd to 7/21/75 at 9:30 A.M.
7-21-75	Before WATSON J - adjd to July 23, 1975 at 9:30 am (for trial)
7-28-75	Before WATSON, J.- Case called- Deft not present- counsel present-case adjd to 8/18/75 at 10:00 A.M. for trial
8-27-75	By WEINSTEIN, J. ORDER setting down pre-trial conference for 9/8/75 at 9:30 A.M. filed. (Copies mailed to attorneys.) <i>BHN</i>
9-8-75	Before WEINSTEIN J - case called - deft & atty Leon Dicker present - defts motion to dismiss the indictment argued and denied - So Ordered. Pre Trial Conference held and concluded - trial set for Oct. 8, 1975 at 9:30 am.
9-9-75	Letter from A.U.S.A. Dearie and accompanying copy of letter to Judge Watson filed
10-3-75	Before WEINSTEIN, J.- Case called- deft not present-counsel present-deft's application for adjournment of trial-argued and denied
10-8-75	Before WEINSTEIN J - case called - deft & counsel L. Dicker present - Trial ordered and Begun - Jurors selected and sworn - trial contd to Oct. 10, 1975., at 10:30 am.
10-10-75	Before WEINSTEIN, J.- Case called- deft and counsel present- trial resumed trial contd to 10/14/75 at 10:00 A.M.
10-14-75	Before WEINSTEIN J - case called - deft & counsel present - trial resumed - trial contd to Oct. 15, 1975 at 9:30 am.

75 CR 277

CRIMINAL DOCKET

DATE	PROCEEDINGS
10/15/75	Before WEINSTEIN, J. - Case called - deft and counsel present - Trial resumed - Govt rests - deft's motion to dismiss denied - trial contd to 10/16/75
10-16-75	Before WEINSTEIN J - case called - deft & atty present - trial resumed - trial contd to Oct. 17, 1975
10-17-75	Before WEINSTEIN J - Case called - deft & counsel present - trial resumed - Harry Iaconetti called and sworn as witness for his own behalf - trial contd to Oct. 20, 1975.
10-20-75	Before WEINSTEIN J - case called - deft & counsel present - trial resumed - Harry Iaconetti resumes as witness for his own behalf - deft rests - Govt rests - trial contd to Oct 21, 1975 @ 10:00 am.
✓ 10-21-75	5 volumes of stenographers transcripts filed (pgs 130 to 856) XXXXXXXXXXXX
10-21-75	Before WEINSTEIN J - case called - deft & atty Mr. Dickman present - trial resumed - deft sums up - Govt sums up - alternates discharged - order of sustenance signed for Lunch - court charges Jury - Marshals sworn - jury retires for deliberation at 3:10 PM - Jury returns at 4:25 PM with a verdict of guilty as to counts 1 to 5 incl. Jury polled and discharged - defts motion to set aside the verdict is denied - trial concluded - bail contd - sentence adjd without date.
✓ 10-21-75	By WEINSTEIN J - Order of sustenance signed (lunch)
✓ 10/23/75	Stenographers Transcript dated 10/21/75 filed
✓ 12-8-75	Letter filed dated Dec. 5 received from Chambers from Leon Dicker, Atty for deft. (adjourning sentence date from Dec. 12 to Dec. 19, 1975) So ordered by Judge Weinstein (see notation of Judge Weinstein at bottom of letter.)
12/12/75	Before WEINSTEIN, J. - Case called - sentence adjd to 12/19/75 at 9:30 A.
12-19-75	Before WEINSTEIN J - case called & sentence adjd to Jan. 6, 1976 at 9:30 am
✓ 12/19/75	Letter filed 12/16/75 filed from L. Dicker to J. Weinsein.
✓ 12/19/75	By WEINSTEIN, J. - Order dated 12/16/75 filed XXXX confirming adjdment of sentencing of deft to 1/7/76 (Order signed on above letter)
1/7/76	Before WEINSTEIN, J. - Case called - deft and counsel present - deft's motion to dismiss counts 3 and 5 is granted without prejudice on condition that the govt may move to reinstate the verdict - deft's motion for new trial denied - deft advised of right to appeal - deft sentenced to imprisonment for a period of 4 years on each of counts 1, 2 and 4 to run concurrently w/ execution of sentence pending appeal granted

PROCEEDINGS

- 5 Judgment and Commitment filed- certified copies to Marshal
By WEINSTEIN J - Memorandum and order filed denying motion of
deft for a new trial.
- 76 Notice of Appeal filed.
- 78 Docket entries and duplicate of Notice mailed to the Court of
Appeals.

INDICTMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
UNITED STATES OF AMERICA

- against -

HARRY DOMINICK IACONETTI,

Defendant.
----- X

INDICTMENT

Cr. No. 75 CR 277
(Title 18, U.S.C. §201(c))
and Title 18, U.S.C. §1951)

Wurster J
4-8-75

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 10th day of February, 1975 and the 11th day of February, 1975, both dates being approximate and inclusive, within the Eastern District of New York, the defendant HARRY DOMINICK IACONETTI, being a public official as defined in Section 201(a), Title 18, United States Code, did knowingly, wilfully, unlawfully, directly and corruptly ask and solicit from Champion Envelope Manufacturing Company, Inc. approximately Nine Thousand Five Hundred Dollars (\$9500.) for himself in return for the defendant HARRY DOMINICK IACONETTI'S being influenced in the performance of his official acts. (Title 18, United States Code, Section 201(c))

COUNT TWO

On or about the 24th day of February, 1975, within the Eastern District of New York, the defendant HARRY DOMINICK IACONETTI, being a public official as defined in Section 201(a), Title 18, United States Code, did knowingly, wilfully, unlawfully, directly and corruptly accept and receive from Champion Envelope Manufacturing Company, Inc. approximately Three Thousand Dollars (\$3000.) for himself in return for the defendant HARRY DOMINICK IACONETTI'S being influenced in the performance of his official acts. (Title 18, United States Code, Section 201(c))

COUNT THREE

From on or about the 10th day of February, 1975 up to and including the 24th day of February, 1975, both dates being approximate and inclusive, within the Eastern District of New York, the defendant HARRY DOMINICK IACONETTI did unlawfully, wilfully and knowingly attempt to obstruct, delay and affect commerce, as that term is defined in Section 1951 of Title 18, United States Code, and the movement of articles and commodities in such commerce, by attempting extortion, as that term is defined in Section 1951 of Title 18, United States Code, in that the defendant HARRY DOMINICK IACONETTI attempted to obtain a sum of money not due him or his office from and with the consent of Champion Envelope Manufacturing Company, Inc., such consent to be induced under color of official right and by fear of economic loss. (Title 18, United States Code, Section 1951)

COUNT FOUR

On or about and between the 15th day of October, 1974 and the 1st day of December, 1974, both dates being approximate and inclusive, within the Eastern District of New York, the defendant HARRY DOMINICK IACONETTI, being a public official as defined in Section 201(a), Title 18, United States Code, did knowingly, wilfully, unlawfully, directly and corruptly ask and solicit from Lightalarms Electronics Corporation, a sum of money for himself in return for the defendant HARRY DOMINICK IACONETTI'S being influenced in the performance of his official acts. (Title 18, United States Code, Section 201(c))

COUNT FIVE

On or about and between the 15th day of October, 1974 and the 1st day of December, 1974, both dates being approximate and inclusive, within the Eastern District of New York, the defendant HARRY DOMINICK IACONETTI did unlawfully, wilfully and knowingly attempt to obstruct, delay and affect commerce, as that term is defined in Section 1951 of Title 18, United States Code, and the movement of articles and commodities in such commerce, by attempting extortion, as that term is defined in Section 1951 of Title 18, United States Code, in that the defendant HARRY DOMINICK IACONETTI attempted to obtain a sum of money not due him or his office from and with the consent of Lightalarms Electronics Corporation, such consent to be induced under color of official right and by fear of economic loss. (Title 18, United States Code, Section 1951).

A TRUE BILL

FOREMAN.

DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

EXCERPTS FROM TRIAL TRANSCRIPT--TESTIMONY OF ALAN FOREST GOLDMAN

1 A L A N F O R E S T G O L D M A N, having been

2 first duly sworn by the Clerk of the Court, took the
3 witness stand and testified as follows:

4 DIRECT EXAMINATION

5 BY MR. DEARIE:

6 Q Mr. Goldman, by whom are you currently
7 employed?

8 A Champion Envelope Manufacturing company.

9 Q How long have you been so employed?

10 A Three and one half years.

11 Q Do you have any particular title or area of
12 responsibility?

13 A Chairman of the board of the company.

14 Q Mr. Goldman, do you know the defendant Harry
15 Dominick Iaconetti?

16 A Yes sir, I do.

17 Q Do you see him here today in the court room?

18 A Yes, I do.

19 Q Will you point him out for us please?

20 A Yes, the man with the glasses.

21 Q The man with which glasses?

22 A The goldrimmed glasses.

23 Q Mr. Goldman, are you aware sir, that in
24 February, January and February of this year your company
25 was engaged in a bid for a Government contract with the

1 6 Goldman-direct
2 General Services Administration?

3 A Yes, I am.

4 Q Could you tell us, Mr. Goldman, whether or not
5 you had occasion in February of this year to discuss that
6 proposed contract with members of your firm?

7 A Yes, I did.

8 Q Who sir, was that?

9 A Mr. Lioi, president of the company, and Mr.
10 Babiuk, executive vice president.

11 Q Mr. Goldman, if I may direct your specific
12 attention to February 10, 1975, did you have on that day
13 the occasion to discuss with Mr. Lioi and Mr. Babiuk a
14 proposed government contract in your office of chairman?

15 MR. DICKER: Your Honor, I object to the form
16 of the question unless any testimony that Mr. Goldman
17 offers has to do with what was made in the presence
18 of the defendant Harry Iaconetti.

19 THE COURT: Overruled.

20 MR. DICKER: Your Honor, I would like to be
21 heard on that particular point if I may because
22 everything he testifies to I am going to object to.

23 THE COURT: You may have a continuing objection.

24 MR. DICKER: Yes your Honor, but more than a
25 continuing objection, in this particular situation

Goldman-direct

1
2 I think that that testimony and totally and absolu-
3 tely hearsay and I would like to be heard on that
4 outside the presence of the jury.

5 THE COURT: Do you have a brief or cases on it?

6 MR. DICKER: No your Honor, I do not have a
7 brief or cases but I have the applicable law and
8 certain statements I would like to get on the record
9 relative to that.

10 THE COURT: All right, do you want me to
11 ask the jury to leave?

12 MR. DICKER: Yes your Honor.

13 THE COURT: The jury will be excused, ladies
14 and gentlemen.

15 (The jury left the courtroom.)

16 THE COURT: Yes, I will hear you.

17 MR. DICKER: Thank you sir.

18 Your Honor, I understand that this testimony
19 is being offered by the Government in rebuttal and
20 and is to cover some of the testimony that Mr.
21 Lioi and Mr. Babiuk told to Mr. Goldman outside the
22 presence of Mr. Iaconetti, the defendant.

23 I think that is hearsay and should not be
24 admissible and is grossly prejudicial to the rights
25 of Mr. Iaconetti and I do not think it is permissible

Goldman-direct

under 803 subdivision 24.

Unfortunately, there are no cases that I have been able to come up with over the weekend or my assistant relative to this other than what appears in the bound volume of the Federal Rules of Evidence. We have a very serious problem relative to Mr. Iaconetti's rights under this situation.

Now, under 803.24, there are certain requirements that are necessary and any testimony that Mr. Goldman might offer relative to his conversations outside the hearing or the presence of Mr. Iaconetti do not fit those particular exceptions so that they would be exceptions to the normal hearsay rule.

I certainly think in a situation like this when he is involved in this particular trial on these charges, that is grossly prejudicial to permit this testimony to come in.

Now what happened here in this case? There was a denial by Mr. Iaconetti of certain statements made by Messrs. Lioi and Babiuk and I do not think that that denial is such an attack on the credibility of a witness as to qualify under this particular section.

One other factor which disturbs me greatly in this situation is that there the government is

1
2 bringing in absolute hearsay testimony relative to
3 conversations between officers and members of a
4 particular corporation which although it may bear
5 to a degree on what Mr. Lioi says, it does not
6 satisfy the requirement in order to come under this
7 particular exception.

8 I again respectfully submit from any of the
9 research I have been able to come up with, I do not
10 find there has been a satisfaction at least of the
11 four convictions relative to the use of a 803 sub-
12 division 24, as yet.

13 There has not yet been shown by the government
14 it is necessary to do that and a reading of the
15 committee's report, and a reading of the notes of

16 both the House committee and the Senate
17 Committee and the joint conference committee prior
18 to the adoption of this particular rule, indicates
19 that it should be used very rarely in a critical
20 trial such as this and I am concerned about the
21 preservation of his rights and his constitutional
22 guarantees.

23 The one use of a case which is cited under
24 the note to paragraph 24 refers to a case, Dallas
25 County against Commercial Union Association Company,

1
2 Ltd., which is cited in 286 F 388 in the 5th
3 Circuit and is illustrative of the point. That
4 involves an insurance case and it is a question of
5 whether or not a tower was struck by lightning in
6 which case it will be covered by insurance or whether
7 it had fallen down because of a structural weakness
8 or other deterioration not covered.
9

10 (Cont'd on next page.)
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4P:GA
15R1 PM

(The jury is in the jury box.)

THE COURT: Ladies and Gentlemen, the fact that an objection is made, and I overruled it, has no bearing on your deliberations, you understand that. The defense counsel did exactly what he should have done in objecting. He made his point. We wanted to argue it at length, and that is why you were excused. The fact you were excused should give no added weight to this testimony, or the objection. Is that clear?

Any further instruction?

MR. DICKER: No, thank you.

DIRECT EXAMINATION

BY MR. DEARIE: (continued)

Q I believe, before we broke I asked you if there came a time, sir, on February 10, 1975, when you had an occasion to discuss with Mr. Lioi and Mr. Bibiuk the then in progress Pre-Award Survey?

A Yes.

Q Could you tell us at what time approximately you first discussed the survey with Mr. Lioi and Mr. Babiuk?

A Approximately 11:30, quarter to 12:00. That morning.

Q Could you tell us approximately where you were, and where this conversation took place?

2 A In Mr. Babiuk's office.

3 Q When you say "we"?

4 A Mr. Lioi, Mr. Babiuk and myself.

5 Q Now, sir, if you will, as best you can recall,
6 will you relate to the Court and Jury that conversation that
7 took place, you say, at approximately 11:30 in Mr. Babiuk's
8 office on February 10, 1975?

9 A Mr. Babiuk had been in closed-door conferences
10 with Mr. Iaconetti through the morning, discussing the contract,
11 discussing our ability to handle the contract, and any of the
12 questions that he might have pertaining to the Survey.

13 I had asked Mr. Babiuk how the meeting had gone,
14 and he said, "We have many problems that Mr. Iaconetti had said
15 were placing roadblocks in our being awarded the contract."

16 I asked him what were the specific problems that
17 had been mentioned or raised in the meeting, and he said, "I
18 have not been able to get any specific points that Mr. Iaconetti
19 could raise as a reason for our not being awarded the contract."

20 In fact, the only particular specific point that
21 Mr. Iaconetti reported to Mr. Babiuk through the morning was
22 the lack of an up-to-date form that was used in executing the
23 contract.

24 Other than that, there was no other specific,
25 and I told him that through the day he should press to find

out the reason why we may not be awarded the contract.

Q Mr. Goldman, did that conclude your conversation of Monday morning between yourself and Mr. Lioi and Mr. Babiuk?

A Yes.

Q Subsequent to that conversation, did you have additional conversation with Mr. Babiuk and Mr. Lioi on February 10th with respect to the Pre-Award Survey?

A Approximately 1:30 in the afternoon, when Mr. Babiuk and Mr. Iaconetti returned from lunch --

Q Where did this conversation take place?

A This took place, I believe, in Mr. Babiuk's office.

Q Do you recall, was Mr. Lioi present as well as yourself?

A Yes, sir.

Q Could you as best you can recall, relate to the Court and Jury that conversation that took place on the afternoon of February 10, 1975?

A I had asked Mr. Babiuk whether he was able to find out whether or not -- whether any of the problems that were mentioned could be specifically tied down, and Mr. Babiuk reported to me that he again could not find any specific reasons for Mr. Iaconetti saying that we would not be awarded the

1 contract.

2 It was decided then that Mr. --

3 MR. DICKER: Your Honor, I object to what was
4 decided.

5 THE COURT: Sustained.

6 Q Tell us, if you can recall, the conversation
7 specifically.

8 THE COURT: I just want to know what was reported
9 to this witness as the defendant's statement. That's
10 all I want to know.

11 I don't want what was in their minds, or any-
12 thing else.

13 Q In view of what the Court has said, what was re-
14 ported to you during this meeting with respect to statements
15 by Mr. Iaconetti?

16 A That was the sum total of it.

17 Q Now, Mr. Goldman, subsequent to this second
18 meeting, did you have still another occasion to discuss with
19 Mr. Lioi and Mr. Babiuk the Pre-Award Survey on February 10,
20 1975?

21 A Yes.

22 Q Could you tell us when that took place?

23 A Approximately 4:45 that afternoon.

24 Q Where did that conversation take place, if you
25

5

1

2

can recall?

3

A I can't recall which office it took place in.

4

Q Okay.

5

6

Now, Mr. Goldman, could you relate to us as best you can recall, that conversation in the context of what, if anything, Mr. Iaconetti said -- Withdrawn.

8

9

Can you relate to us that conversation as to the context of what Mr. Iaconetti's specific words were?

10

11

12

13

A Mr. Lioi reported to me that he had had a lengthy conversation with Mr. Iaconetti in Mr. Lioi's office, he reported to me that he had discussed at length the reasons why we might not be awarded the contract.

14

15

16

MR. DICKER: Your Honor, I object to that response. He should be devoting himself to saying just what Mr. Iaconetti said, and not paraphrasing --

17

18

19

THE COURT: I will take this. When we get to the more critical parts, we will go into it, and you may cross-examine.

20

21

22

23

24

25

A I was told that we could not be awarded the contract unless we could overcome certain problems, and the problems were basically in the form of hurdles that existed within the General Services Administration, that could be overcome by a payment of approximately 1 to 1 1/2 percent of the contract that was won by us by being low bidder.

Goldman - direct

848

Q Do you recall during this conversation, did Mr. Lioi have occasion to tell you anything that the defendant specifically said?

A He specifically said that such payment, which would be divided among some people within the General Services Administration, would help to remove the problems that existed in being awarded the contract, and further, such payments for this contract, and perhaps in the future, would help us win other contracts that could be awarded without competitive bidding, also. I was told that this was not something that was that unique, it had taken place over the history of the General Services Administration, and perhaps it goes back 200 years, in terms of the method of awarding contracts, and the fact that oftentimes the lowest bidder doesn't often win it, but there is someone who can be awarded a contract without necessarily being low bidder, by virtue of making such payments.

MR. DEARIE: I have nothing further.

CROSS EXAMINATION

BY MR. DICKER:

Q Mr. Goldman, 4:45 P.M. you just testified Mr. Lioi reported certain facts to you relative to a conversation he had with Mr. Iaconetti in his office, is that correct?

A That is correct.

Q You said this had been certainly going on for

7 1

2 over a long period of time in the General Services Administra-
3 tion as to the awarding of contracts?

4 A Yes.

5 Q Just what did Mr. Lioi say to you?

6 A Mr. Lioi had told me --

7 Q What did he say to you in so many words?

8 A Mr. Iaconetti had told him that was a prevalent
9 act.

10 Q Did he say anything further, other than it was
11 a prevalent act?

12 A Yes. It had gone back over many, many years,
13 and not something that originated with this particular con-
14 tract.

15 Q How long had it been going on?

16 A It could go back to the time -- I seem to recall
17 the time -- that the first rifle was sold to the Government.

18 Q Mr. Lioi say anything to you? Anything else to
19 you?

20 A With reference to what?

21 Q That conversation at 4:45 as to what Mr. Iaconetti
22 said to him?

23 A I believe I recalled all of the pertinent facts
24 that took place during that conversation.

25 Q Did Mr. Iaconetti -- I'm sorry, sir, Did Mr. Lioi

8 1 say to you whether or not Mr. Iaconetti had definitely said
2 that Champion Envelope would not get a favorable Plant Facil-
3 ities Report?
4

5 A I can't recall.

6 Q Do you recall whether Mr. Lioi said to you that
7 he was doubtful whether you would get a successful Plant Facil-
8 ities Report?

9 A Yes.

10 Q Did he indicate to you whether he thought you
11 had a chance to get a favorable Plant Facilities Report?

12 A Yes. If we made payment of certain sums of
13 money.

14 Q Do you know, on February 11th that Mr. Iaconetti's
15 conversations were being taped?

16 A Yes.

17 Q Did you hear the tapes?

18 A No.

19 Q They were made in your office, and you never
20 heard them?

21 A No, I did not.

22 MR. DICKER: I have no further questions, your
23 Honor.

24 THE COURT: Step down.

25 Any other witnesses?

EXCERPTS FROM TRIAL TRANSCRIPT--TESTIMONY OF MORRIS STERN

8a

MR. DEATRE: One more. The Government calls

2

Mr. Morris Stern.

3

R2 fls

4

(continued on next page.)

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n2 MP:BD 1

M O R R I S S T E R N , a witness called on behalf

2

of the United States of America, was sworn by the

3

Clerk of the Court and testified as follows:

4

DIRECT EXAMINATION

5

BY MR. DEARIE:

6

Q Mr. Stern, would you tell the Court nad jury

7

what your present occupation is?

8

A I am an attorney at law.

9

Q How long have you been admitted and

10

approximately where?

11

A Ten years in the State of New Jersey.

12

Q Do you know a company by the name of Champion

13

Envelope?

14

A Yes.

15

Q Are they a client of yours?

16

A Yes, they are.

17

Q Do you know Mr. Michael Lioi?

18

A Yes.

19

Q Mr. Stern, may I take you bakc to February,

20

1975, sir?

21

A Yes.

22

Q Do you recall during that mnth receiving a

23

telephone call from Mr. Mike Lioi?

24

A Yes, I do.

25

Q Could you approximate when you received that

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Stern-direct

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call?

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A I received several calls from Mike Lioi in that month. The first one that I recall was related to -- well, if I can start it this way, he called me after dinner one evening at my home. It was towards nine, ten o'clock I believe. He indicated that someone from GSA --

MR. DICKER: Your Honor, what he indicated -- I think he should say what he said.

THE COURT: Tell us to the extent you can what was said.

THE WITNESS: Mr. Lioi said that an individual from GSA had been in the factory that day and that the individual had been there for purposes of doing a pre award survey with regard to a contract that Champion had bid on.

This individual had at one point in the day asked him directly for money. I believe the amount was \$12,000. And that that money was to feather the bed and give Champion that contract.

He also indicated that --

MR. DICKER: What did he say?

THE WITNESS: I'm sorry. He also said that the man offered him a deal with regard to future contracts.

1 Stern-direct

2 Q I take it at some point in the conversation
3 Mr. Lioi sought your advice?

4 A Yes. Mr. Lioi said that he was -- he either
5 said he had prepared his office or was in the process of,
6 I don't recall, preparing his office with some type of
7 recording device and going to have the man from GSA back in
8 the office and going to record the conversation.

9 He also asked my advice with regard to what
10 authorities he should contact.

11 MR. DICKER: Your Honor, I object to that.
12 He should be restricted to what Mr. Iaconetti said
13 and not what Mr. Lioi said. This certainly has no
14 bearing --

15 THE COURT: All right.

16 MR. DEARIE: I have nothing further, your
17 Honor.

18 CROSS-EXAMINATION

19 BY MR. DICKER:

20 Q Do you recall, Mr. Stern, whether or not
21 Mr. Lioi said he had the recording device in his office?

22 A I am not -- I don't recall whether he said
23 that he had set it up or would set it up. I don't recall
24 that.

25 Q You had no recollection whether it was

Stern-cross -

operative on February 10?

A On the night he called me, I don't recall if he said it was then operative or would be the next day.

MR. DICKER: I have no further questions.

THE COURT: Anything further?

MR. DEARIE: The Government rests.

THE COURT: Anything further?

MR. DICKER: No.

THE COURT: All right, ladies and gentlemen.

You have heard all of the evidence in the case.

Tomorrow we will hear arguments. You will hear the charge and then you will begin your deliberations.

I want you to inform your families that you might be late tomorrow. I don't know what the situation is but tell them to be flexible about when you are coming home.

Be here please at 10:00 o'clock. Don't discuss the case and keep an open mind.

Thank you and good night.

(The jury left the courtroom.)

THE COURT: I will hear you.

MR. DICKER: Thank you, sir.

Your Honor, at this time I would like to renew all the motions that I made on the conclusion of the

Stern-cross

Government's case particularly I would like to move for a judgment of acquittal on all the counts in the indictment. Specifically I would like to devote me attention to counts 3 and 5 which deal with extortion. In those particular counts I reiterate the Government has failed to establish that all the necessary ingredients required in Title 18, Section 1951 have been met and on that basis the defendant is entitled to a judgment of acquittal.

Further, in Count 4, which deals with the solicitation of a bribe from the Lightalarms Electronics Corporation. I renew that aspect of the motion for the Government's failure to prove beyond a reasonable doubt that there was a solicitation under Section 201C Title 18 with reference to the Lightalarms Electronics Corporation.

Finally, I renew the motion relative to Counts 1 and 2 as dealing with the Champion Envelope Company.

THE COURT: Denied in all respects.

MR. DICKER: Exception.

THE COURT: Anything further, gentlemen?

MR. DEARIE: No, your Honor.

THE COURT: You have all seen the redone

EXCERPTS FROM TRIAL TRANSCRIPT--PORTIONS OF COURT'S
STATEMENT RELATIVE TO REBUTTAL PROCEDURES

JBhb

Iaconetti-direct

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1 THE COURT: Now, I must say that I was somewhat
2 startled by the defendant's flat denials that these
3 conversations had taken place both in Champion and in
4 the Lightalarms place of business with a number of
5 people. In view of what was on the tapes, I had
6 expected him to give some other explanation.
7

8 MR. DICKER: Your Honor, he was -- I'm sorry,
9 sir.

10 COURT: I think under the circumstances,
11 the Government may want to consider whether it wishes
12 to offer the testimony of other members of the firms.
13 In the case of Sonner, whether Sonner, after the
14 conversation went back and discussed it with his
15 relatives, and what was said and what the report was
16 at the time. And in the case of Lioi and Babiuk, the
17 same thing, whether there was discussion about the
18 Champion officials with respect to what to do and
19 what was reported.

20 Now, there are a variety of theories that you
21 might want to consider. I don't know what counsel for
22 both sides would want to do about it.

23 There is, of course, Rule 801(1)(b), that is,
24 testimony which is consistent with his testimony in
25 his offer to rebut an express charge of recent

2 1 fabrication. A contemporaneous report, that is, what
2 was said, of course, comes under such a rule.
3

4 There is also 801(d)(2)C: A statement by a
5 person authorized by him to make statements concerning
6 the subject.

7 If a person asks another person for a bribe,
8 and it's understood that he will have to get consent
9 of his partners to pay the bribe, query, whether that
10 is not an implied or direct authorization to take it up
11 with the partners and to transmit the information to
12 the partners.

13 There is also Rule 804-24, which is the general
14 exception. That requires that notice be given.

15 And if the Government, therefore, proposes to
16 use this type of rebuttal evidence on Monday -- and
17 I will permit you to go over it if you want. If I
18 should decide it will come in, you will have to give
19 the defendant notice today.

20 I am prepared to rule on the preliminary ques-
21 tions required of the Court under Rule 801 if the
22 Government wants to proceed in this way. But I think
23 that the Government had better consider seriously what
24 it wants to do, and so had the defendant.

25 MR. DEARIE: Your Honor, if --

Iaconetti-direct

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THE COURT: So we can discuss it.

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Well, you needn't decide it now. We are going

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to have to take a break.

5

MR. DICKER: I want to say relative to this,

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the conversations testified to by Mr. Iaconetti took

7

place on February 10th when there were no tapes. And

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there are no tapes relative to this, so that --

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THE COURT: I understand. That's exactly the

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point.

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MR. DICKER: Fine.

12

THE COURT: Thank you, gentlemen.

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(Recess taken.)

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EXCERPTS FROM TRIAL TRANSCRIPT

837

ARGUMENT RE ADMISSIBILITY OF REBUTTAL EVIDENCE

Knb

1 MR. DICKER: It is one thing to be concerned
2 about money, it is another thing to be concerned about
3 the constitutional guarantees that the defendant is
4 entitled to. I think that the waiver of the hearsay
5 rule in this particular case would be grossly pre-
6 judicial and I object strenuously to the admission
7 of any evidence of such a nature.

8 MR. DEARIE: Very briefly, your Honor, of course
9 it is our position that the testimony of Mr. Goldman,
10 which will be limited to conversations between himself
11 or amongst himself, Mr. Babiuk and Mr. Lioi, is not
12 hearsay, by definition, under Section 801. It is going
13 to concern or introduce statements of Mr. Lioi and
14 Mr. Babiuk that would be consistent with their testi-
15 mony and will, of course, be offered to rebut the
16 express charge made here during the course of this
17 trial of recent fabrication. Initially, this brief
18 testimony from Mr. Goldman and in a minute from
19 Mr. Stern, will relate to statements by Mr. Lioi and
20 Mr. Babiuk and therefore are not hearsay. I might
21 simply state that 803.24, of course, and both the
22 Senate and House notes on that make it very clear that
23 exists for the purpose of allowing the District Court
24 and the trial court to apply it to any situation where
25 he deems it appropriate and where the potential hearsay

1 has independent probative value and may rule admitting
2 such evidence and we can rely on that. We need not
3 rely on it, this is simply by definition not hearsay.
4

5 MR. DICKER: One further word. Relative to
6 801, the definition of hearsay, it is set forth in
7 801 as Mr. Dearie says. However, I dispute with
8 Mr. Dearie as to what he says relative to this not
9 being hearsay based on 801(d), Subdivision (1), either
10 (a) or (b). Again, we are dealing with the situation
11 where this is hearsay testimony violative of his
12 rights and entirely prejudicial and that is the basis
13 for my objection.

14 THE COURT: Motion to exclude is denied.

15 This comes almost directly within the framework
16 of U.S. vs. Annunziato 293 F. 273, cert. denied, 368,
17 U.S. 919-1961, opinion of Judge Friendly.

18 It is highly probative and relevant and therefore
19 it comes within Rule 401. Prejudice does not over-
20 balance probative force and therefore Rule 403 does
21 not apply.

22 Under Rule 801 (d) (1) (B):

23 These statements, which I take it the witness
24 will testify to indicating what Lioi said consistent
25 with Lioi's testimony and offered to rebut an expressed
or implied charge against him of fabrication, improper

1 influence or motive. Here motive is clearly involved.

2 In addition, it come under 801 (d) (2) (C) as
3 "a statement by a person authorized by him to make a
4 statement concerning the subject."

5 I find beyond a reasonable doubt that the
6 defendant did make a request for a bribe on February 10
7 and that he did authorize the witness Lioi to take the
8 matter up with his associates in order to get his
9 associates' permission to pay that bribe, and I find
10 that the transcript of the 11th confirmed that belief.

11 Therefore the statements are authorized
12 admissions of the defendant under this rule.

13 803 (24) applies in "that (A) the statement is
14 offered as evidence of a material fact," and I so
15 find.

16 "(B) The statement is more probative on the
17 point for which it is offered than any other evidence
18 which the proponent can procure through reasonable
19 efforts." I so find. This is the most powerful
20 evidence of what was said in view of the straight
21 conflict between the chief witness for the prosecution,
22 Lioi, and the defendant, with respect to what happened
23 on the critical date of February 10th.

24 "(C) The general purposes of these rules and
25 the interests of justice will best be served by

1 admission of the statement into evidence."

2 We have here a clear conflict of credibility
3 and the jury is entitled to get such evidence on the
4 point and to decide the issue itself.

5 In addition, I find that the Government gave
6 the defendant under the circumstances ample advance
7 notice of the intention to offer the statement. That
8 notice was given Friday, which was the first date
9 really upon which it could have been concluded that
10 this kind of evidence would have been needed.

11 In addition, there is a fourth reason, and that
12 is that the meaning of the words used by the defendant
13 on February 10, the critical date, depends to a
14 considerable extent on body motions and whether he was
15 laughing or whether he was winking, whether his tone
16 of voice would give color and meaning to words which
17 otherwise would be neutral.

18 Even the words "I don't want to take a bribe
19 and I will not take one" said with a wink and a smile
20 might well be interpreted to mean exactly the opposite.
21 That is apparent when you listen to the recording and
22 belies completely the defendant's statement that he
23 had no such meaning.

24 It is also important to put it in because we have
25 the statement made by the defendant to the FBI that this

A- 35

1 was all a joke and the fact that Lioi on the 10th did
2 not take it as a joke and he took it up with his
3 partners, is entirely probative of the fact it was not
4 intended as a joke.

5 So that the Rules of Evidence as well as the
6 precedents absolutely require the admission of this
7 evidence and I think it would be a travesty to exclude
8 evidence so entirely probative as this and I will not
9 do it.

10 If you have an objection and if there should
11 be a conviction I think --

12 MR. DICKER: Yes, I would like to make my
13 objection.

14 THE COURT: I think you have a good point on
15 appeal. I am very pleased you did bring it up because
16 it is a good point.

17 MR. DICKER: I would like the record to register
18 my objection.

19 THE COURT: And exception.

20 MR. DICKER: Thank you.

21 One other thing. Would your Honor instruct
22 the jury when they come in that the fact that this
23 testimony is going to be taken now is no reflection on
24 the defendant or anything they heard as to the fact
25 that I said I was objecting to it and I think some

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statement should be made --

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THE COURT: You mean the fact you objected or
that it be excluded and has no bearing?

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MR. DICKER: Both, your Honor, so there will not
be any unusual import as far as the jury is concerned
as to the admission of this testimony.

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THE COURT: I will be happy to do that. Bring
in the jury.

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(Continued on next page.)

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amRl

1 MR. DEARIE: Your Honor, preliminarily, before
2 the jury arrives, in the interest of saving time, I
3 have supplied Mr. Dicker this morning with yet another
4 copy of the transcript. I have a copy for the Court.

5 I advised Mr. Dicker at the time there are
6 very minor red line portions that the Government does
7 not intend to play for the benefit of the jury.

8 I have red-lined --

9 THE COURT: Mark them, please.

10 MR. DEARIE: Mr. Dicker and I have had
11 previously agreed that the tapes and transcripts
12 would be marked in evidence but I understand
13 Mr. Dicker has an application.

14 MR. DICKER: Yes, prior to the introduction of
15 the tapes, I would move to exclude the tapes under
16 the authority of Esberti against the United States.

17 THE COURT: What?

18 MR. DICKER: I have a case which I would refer
19 to you relative to the admission of these particular
20 tapes considering the fact there is a bribery count
21 and there are extortion counts herein and there is
22 one particular case I rely on.

23 Your Honor, it is Esberti against the United
24 States, 406 Fed. 2d 148.

25 THE COURT: Page?

1 MR. DICKER: 148. It's the last paragraph of
2 the case, numbered 11.

3 THE DEARIE: Transcript marked as Government's
4 Exhibit 16 in evidence.

5 MR. DEARIE: We better have this at side bar.

6 (The jury is in the jury box.)

7 (The following took place at side bar.)

8 MR. DICKER: In this particular case, the
9 defendants were convicted of a violation of
10 Section 1951, Title 18. On the appeal the conviction
11 was affirmed. However, this was a converse situation.
12 Here the defendant had argued that the Court's
13 refusal to admit into evidence the actual tapes of
14 the alleged bribery attempt was error, but the Court
15 said that there was no error -- these tapes are
16 rampant of Counts Two and Four as well as Three and
17 Five and I think the Government has to decide
18 whether it is going under the bribery or extortion
19 charge.

20 MR. DEARIE: I should note of course I have
21 not been apprised of this. This motion was made
22 prior to trial before Judge Watson to exclude both
23 the tapes and the transcripts. Judge Watson denied
24 the motion as to both the tapes and the transcripts.
25 It seems to me, based upon my overhearing of

1 Mr. Dicker, he fails to realize one basic fact in
2 this situation, we have a man on trial who is accused
3 of having received the money and the Government does
4 not have to choose a particular theory, bribery
5 vis-a-vis extortion --

6 THE COURT: The motion is denied. It comes
7 much too late. The jury is already sitting here and
8 we've got all the equipment set up and I am not
9 going to hear this separate motion. In addition, all
10 this material is highly relevant to the state of mind
11 of the defendant and the reason he was making these
12 statements.

13 Let's continue.

14 (The following took place in open court.)

15 THE COURT: Good morning, ladies and gentlemen.
16 We have been working on that other case which is why
17 you have been downstairs.

18 MR. DEARIE: May we continue?

19 THE COURT: Yes.

20 MR. DEARIE: The Government calls at this
21 time Mr. Zenon Babiuk.
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(continued on next page)

EXCERPTS FROM TRIAL TRANSCRIPT--PORTIONS OF TESTIMONY
OF RALPH DIGIACAMO

DiGiacamo-cross

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2 inspectors relative to the dollar value?

3 A No, at least, I'm not aware of them.

4 Q Now, we are talking or we were talking before
5 of the plant facilities report from the Quality Assurance
6 Inspector which goes to his Supervisor; do you refer to him
7 as the Branch Chief?

8 A I don't believe he is, I believe there is a
9 Branch Chief above the Supervisor.

10 Q Now, does that Branch Chief get to see the plant
11 facilities report?

12 A I'm just going to have to answer that same way
13 as I said before, I don't know of the internal operations of
14 this man's section.

15 Q All right.

16 Then let me ask you this, Mr. DiGiacamo:

17 We talked about the fact that in a bid in the amount of
18 over one million dollars we have to be concerned with a
19 financial report, with compliance with the equal opportunity
20 law, and finally with the plant facilities report.

21 A That is true.

22 Q A, B and C.

23 A Not A, B and C. C, B and A; they are of equal
24 importance.

25 Q They are of equal importance?

1
2 A It's approximately 12 recommendations, capable
3 of performing.

4 Q Is that document dated with respect to Mr.
5 Iaconetti's signature?

6 A Yes, February 11, 1975.

7 Q And is there finally a space on the face of
8 that document for comments?

9 A Yes.

10 Q Would you read that to us, please?

11 A Evaluating all factors, bidder is able to
12 deliver more than double the amount required of the bid.

13 MR. DEARIE: Thank you.

14 I have no further questions, your Honor.

15 CROSS-EXAMINATION

16 BY MR. DICKER:

17 Q Mr. DiGiacamo, the plant facility report that
18 was signed by Mr. Iaconetti that shows the completion date
19 was February 11, 1975, is that correct?

20 A I can't testify to that date because I don't
21 know whether that's the date he wrote it or the date he made
22 the inspection.

23 Q But at least that's the date that the report
24 is completed by him?

25 A Presumably. He signed it that day.

DiGiacamo-cross

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Q Do you have any knowledge of when he made his inspections?

A No.

Q Now, this report is all that he has to do relative to his function as a quality control man. Isn't that so?

A At this particular time, yes, I would agree with that.

Q Would you say that this at least on February 11, 1975 was an official report?

A It says so, yes.

MR. DICKER: I have no further questions.

MR. DEARIE: Nothing further.

THE COURT: Next witness.

L O U S O N N E R , called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. DEARIE:

Q Would you state once again your full name?

A Lou Sonner.

Q By whom are you employed?

A Lightalarms Electronics Corporation.

Q Do you enjoy any degree of ownership in that

2 Q Do you know by whom that particular survey
3 was conducted?

4 A Mr. Iaconetti.

5 Q Do you see him in this courtroom?

6 A Yes.

7 Q Please point to him.

8 A The gentleman in the center.

9 Q During this particular pre-award survey, were
10 there any problems or difficulties that you were confronted
11 with?

12 A No.

13 Q Was a conclusion of capability reached by the
14 quality inspector?

15 A Yes.

16 Q Which would be Mr. Iaconetti?

17 A Yes.

18 Q When did you receive word that you had been
19 awarded a contract?

20 A October 1st.

21 Q Of last year I assume?

22 A Yes.

23 Q With the term to commence when?

24 A The term beginning November 1st..

25 Q Prior to this time had you had any difficulties

Sonner-direct

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2 whatsoever during the pre-award survey phase or immediately
3 after you received word that you had been awarded the contract?

4 A No.

5 Q Generally, your history with the General
6 Services Administration -- have you ever been found incapable
7 of performing a proposed contract?

8 A No.

9 Q I direct your attention to October 22, 1974.
10 Do you recall having a conversation with the defendant,
11 Harry Iaconetti, on that particular date?

12 A Yes.

13 Q As best you can recall, would you relate to us
14 what Mr. Iaconetti said to you and what, if anything, you
15 said to him?

16 MR. DICKER: Where was that conversation?

17 Q Could you tell us first of all where that
18 conversation took place?

19 A I think it was over the telephone in my office.

20 Q You were in your office?

21 A I was in my office.

22 Q Now, can you tell us as best you can recall
23 what was said?

24 A We had to obtain a letter from the battery
25 company in regard to the specifications of the contract and

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A In my office.

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Q Was anyone else present at the time?

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A No.

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Q Did you have a conversation at the time?

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A Yes.

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Q As best you can recall, would you tell us what you said to Mr. Iaconetti and what, if anything, he said to you.

10

A Well, he said that he had some physical problems and he was going to go into this hospital for an operation and that the money he had laid out was money prepared for the operation and it was very important that I give him the money so he would have it for the hospital bills and so on. I said I couldn't do it and he said he could then take a loan to cover that if he could count on him to give him the money afterwards and I told him that I would.

19

Q Subsequent to this meeting, did you have an opportunity to meet with Mr. Iaconetti again?

21

A No.

22

Q Following this meeting, sir, did you report these facts to any one within the General Services Administration?

25

A No.

Sonner-direct

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2 Q Mr. Sonner, did you ever pay Mr. Iaconetti any
3 money in connection with any Government contract?

4 A No.

5 Q Did you consider paying Mr. Iaconetti in connec-
6 tion with this particular contract?

7 MR. DICKER: He answered that already. He
8 said he was going to give him something Christmastime.

9 THE COURT: Go ahead. That is not quite what he
10 said.

11 Q Mr. Sonner, subsequent to this last conversation
12 you described for us, did there come a time when you did in
13 fact make a report to the --

14 A Yes.

15 Q To whom did you make the report?

16 A Mr. Kraft.

17 Q Following this report to Mr. Kraft, did you
18 hear from Mr. Iaconetti again?

19 A No.

20 Q Did you attempt to contact Mr. Iaconetti?

21 A No.

22 Q To your knowledge, did Mr. Iaconetti or anyone
23 acting on his behalf attempt to contact you?

24 A No.

25 Q I take it, sir, as of November 1, that year,

Sonner-direct

1974, this contract went into effect, is that right?

A Yes.

Q Did you have available to you at that time a Quality Assurance specialist?

A Yes.

Q What, sir, was his name?

A Mr. Bartley, B-a-r-t-l-e-y; Herman Bartley.

Q Did Lightalarms Electronics Corporation succeed in manufacturing pre-production samples?

A Yes.

Q Mr. Sonner, were these pre-production samples eventually approved?

A Yes.

THE COURT: I didn't have in my notes when this was reported to Mr. Kraft, ultimately.

Q Could you approximate for us when you made this report to Mr. Kraft?

A Approximately one week after my last conversation with Mr. Iaconetti.

Q Which would have been around when?

A (No response.)

Q Approximately.

A Approximately November 1st or 2nd.

Q Now, Mr. Sonner, let me show you finally what

1
2 A This was a couple of days after my last conver-
3 sation with Mr. Iaconetti so I would say about October 28,
4 29.

5 Q Do you know what Mr. Bartley's function was in
6 your plant?

7 A He was to become our new Quality Control
8 Inspector.

9 Q He replaced Mr. Iaconetti?

10 A He did.

11 Q Now, you testified on direct examination that
12 you waited a week after your last conversation with
13 Mr. Iaconetti and you telephoned Mr. Kraft to report the
14 matter of Mr. Iaconetti, is that correct?

15 A I did not say that.

16 Q Tell me what you did within a week after --
17 withdrawn.

18 When did you first call Mr. Kraft after your last
19 conversation with Mr. Iaconetti?

20 A I didn't call him. He came to see me.

21 Q Was his visit a surprise to you?

22 A No.

23 Q Did you arrange an appointment with him?

24 A No.

25 Q You had a conversation with him at the time he

1
2 came to the plant?

3 A Yes.

4 Q Is this the Mr. Kraft who you testified you
5 inquired whether he was one of the alleged higher-ups?

6 A Yes.

7 Q Now, isn't it a fact that Mr. Iaconetti's plant
8 facility report was dated August 30, 1974, approving the bid
9 of Lightalarms?

10 A I am not sure. I have a report which shows the
11 date of September 4.

12 Q But this contract was to begin November 1?

13 A November 1st, yes.

14 Q Is this contract still in existence?

15 A Yes.

16 Q Has it been terminated or cancelled for any
17 reason?

18 A No.

19 Q Under that contract, is the Government obligated
20 to make purchases from Lightalarms?

21 A Yes.

22 Q Does the Government give any sort of a guarantee
23 of the amount that it is to purchase?

24 A No.

25 Q And what in your opinion would be the dollar

1
2 value of the contract?

3 A The current contract?

4 Q Yes, the contract which came into being after
5 the plant facility report --

6 MR. DEARIE: Is Mr. Dicker referring to this
7 date or as of the date the contract was first signed?

8 MR. DICKER: I will rephrase the question.

9 Q Mr. Iaconetti's plant facility report was dated
10 August 30, 1974, you say it came to your knowledge sometime
11 in September. After the plant facility report approved
12 Lightalarms, did this contract come into being about November 1,
13 '74?

14 A Yes.

15 Q This contract is still in existence?

16 A Yes.

17 Q Have you made deliveries under that contract?

18 A Yes, we have.

19 Q What is the dollar amount of that particular
20 contract?

21 MR. DEARIE: As of what date?

22 MR. DICKER: As of the commencement of the
23 contract.

24 THE COURT: You mean how much he sold?

25 MR. DICKER: How much was the bid under that

Sonner-cross

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Mr. Iaconetti that took place in your office, there was only the two of you?

A That is correct.

Q At no time was there ever any member of your firm present?

A Not at these conversations.

Q Do you know whether or not Mr. Iaconetti had any conversations relative to the contract with any other members of your firm?

A (No response.)

Q Subsequent to the completion of his plant facility report?

A He may have had some conversations with other people in the plant, yes.

Q Do you know if he had?

A Not really, no.

Q Now, when did you first start producing the items under the contract?

A Approximately the end of January.

Q And in this contract the items are to be inspected at the source?

A Yes.

Q At the time, Mr. Iaconetti had no official capacity as a Quality Control Inspector in your plant, is

Sonner-cross

109

1
2 that right?

3 A That is right.

4 Q Do you know whether or not Mr. Iaconetti was
5 out on sick-leave during October 1974?

6 A I don't know that he was out but I know what he
7 me. He told me that he was going into the hospital for an
8 operation on, I believe, a slipped disc.

9 Q Do you know whether or not he had that operation?

10 A No, I don't.

11 Q Did Mr. Iaconetti at any time threaten you with
12 the loss of that contract?

13 A No, he didn't threaten me.

14 Q Did he ever say to you specifically that unless
15 you gave him money, you would lose the contract?

16 A No, he didn't state that specifically.

17 Q You testified you had a feeling you would lose
18 the contract, is that correct?

19 A Yes.

20 Q But there was no threat made to you by
21 Mr. Iaconetti relative to that?

22 A That is correct.

23 Q You testified that there were some difficulties
24 relative to the production samples. What did that entail,
25 Mr. Sonner?

EXCERPTS FROM TRIAL TRANSCRIPT--PORTIONS OF TESTIMONY
OF ZENON BABIUK

Babiuk-direct

150

It is what the defendant did that counts, not what this witness' impressions were.

MR. DEARIE: Thank you.

Would you read the last question and answer.

(Whereupon, the last question and answer were read by the reporter.)

MR. DEARIE: Would that complete your answer?

THE WITNESS: Yes, sir.

Q Now, sir, finally may I ask you if there ever came a time in the conversations you described here this morning where Mr. Iaconetti asked you for any sum of money or anything specific?

A No, sir. He never did.

MR. DEARIE: I have nothing further, your Honor.

CROSS-EXAMINATION

BY MR. DICKER:

Q Mr. Babiuk, you testified Mr. Iaconetti never asked you for any money?

A No. Mr. Iaconetti never asked me.

Q Did he ever tell you that unless you gave him something, you would not get the contract?

A No, sir, he never did.

Q Did he ever threaten you in any way?

A Threaten how?

Babiuk - Cross/Dicker

152

1 3
2 you mainly discussed the contract?

3 A Yes.

4 Q Now, when you came back after lunch, did Mr.
5 Iaconetti express any reservations to you about the capability
6 of Champion Envelope to perform under any contract that would
7 be awarded to it?

8 A Yes.

9 Q What did he say to you?

10 A He said we had a problem we have got to resolve.

11 Q And that was said to you after you had gone
12 through the bids, A and B or 1 and 2?

13 A Well, he said it before that, he repeated it.

14 Q He reiterated that?

15 A Right.

16 Q Now, did you have any further discussions with
17 Mr. Iaconetti relative to your bids after Mr. Lioi came into
18 the office?

19 A Yes, I met him shortly before he left the
20 office.

21 Q Well, tell us when that was and about what
22 time and where.

23 A Well, it was again in my office, he stopped by
24 to tell me that everything looks all right, he is going to
25 sit down and write up his report.

8

Babiuk - Cross/Dicker

163

the contract?

A The contracting officer will either telephone us or send us a letter informing us that we have been awarded the contract.

Q And you were awarded this contract?

A Yes.

Q And have you performed under that particular contract?

A Yes; we have.

Q Now, at present is that contract concluded?

A Yes, it is.

Q And do you have another government contract ?

A Yes.

Q For what particular amount?

A The amount is undetermined, it depends upon the requirements of various agencies, no dollar amount was set; one can estimate it is a couple of hundred thousand dollars.

Q Now, when the bid was submitted by Champion Envelope, did you actually know -- did you know whether or not the inspection of your products would be set at source or set at destination?

A Well, they were for the past several years at the source.

Q How about this particular contract that Mr.

2

Lioi - Direct

165

Mr. Michael Lioi.

M I C H A E L L I O I, called as a witness, having been first
duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DEARIE:

Q Mr. Lioi, would you advise the Court and the
jury by whom, sir, you are employed.

A I am employed by the Champion Envelope Manufac-
turing Company.

Q And what particular capacity do you hold, sir?

A I am the president of the company.

Q Do you enjoy an ownership of the corporation?

A Yes, I am one of the owners.

Q Mr. Lioi, to your own knowledge, are you pre-
sently under contract with the General Services Administration?

A Yes, I am.

Q For what, to manufacture what particular items?

A The manufacture of envelopes under contract
upon which we bid.

Q And do you know, sir, the approximate amount of
that contract?

A The approximate of the contract was \$1,210,000.

Q Now, I take it, sir, in connection with the
contract there came a time when a pre-award survey was

5 Lioi - Direct

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2 Q Mr. Lioi, I take it that prior to this conver-
3 sation you did have some contact with the defendant; is that
4 correct?

5 A Yes, on one occasion approximately ten to twelve
6 months before that, at least it was during the prior year, on
7 one occasion Mr. Iaconetti came to Champion Envelope for an-
8 other pre-award survey of a much smaller contract that we had
9 won, and I was involved with him briefly at that time during
10 one morning.

11 Q Do you recall perhaps the dollar amount of that
12 contract?

13 A The dollar amount of that contract was approxi-
14 mately \$40,000 to \$50,000.

15 Q Did there come a time then, sir, in February
16 that you had the occasion to meet with Mr. Iaconetti?

17 A Yes, that Monday morning, February 10th, Mr.
18 Iaconetti came into the office.

19 Q Did you have a discussion with Mr. Iaconetti
20 at that time?

21 A Yes.

22 Q I ask you first of all, Mr. Lioi, was anybody
23 else present during this discussion?

24 A No one else was present.

25 Q And where specifically do you recall did that

1 2 Lioi - direct

2 as to the word "payment." "Paid him \$3,000."

3 THE COURT: Sustained.

4 BY MR. DEARIE:

5 Q Mr. Lioi, you testified before the break that
6 you delivered a sum of \$3,000 to Mr. Iaconetti; is that
7 correct?

8 MR. DICKER: Your Honor, I object to the form
9 of the question as to delivering of \$3,000.

10 THE COURT: Just what he did.

11 BY MR. DEARIE:

12 Q Would you describe once again, Mr. Lioi, what you
13 did in connection with that sum of money?

14 A Yes. I handed the envelope containing that
15 sum of money to Mr. Iaconetti, who said: No, put it down
16 there, pointing into the trunk of his car. And I then
17 dropped the envelope containing the \$3,000 into the trunk
18 and he closed the lid.

19 Q Mr. Lioi, would you tell us what \$3,000 it was
20 that was involved?

21 A This was the company's funds. It was extracted
22 from one of the company's checking accounts, a check was
23 drawn and the cash itself was received by the company.

24 Q All right.

25 Mr. Lioi, at this time I'd like to show you

p/pc
ake 4pm/1

Lioi-cross/Dicker

Q Therefore, sir, you were sure your company could perform under the contract if it was awarded to you, is that correct?

A That is correct.

Q Now, on February 10, when Mr. Iaconetti first appeared at the office, did you know his full name?

A I knew the name Harry Iaconetti. I don't think I knew his middle initial at that time.

Q When he said to you that this is a big contract or words to that effect, it would be tough to justify, what did you say to him?

A I said that I thought that -- I was sure that we could satisfy any of the requirements they might have, meaning GSA, in the pre-award survey, and he indicated again a couple of times, repeating, this is really a big one.

Q Isn't it a fact, Mr. Lioi, that it is a big contract, the biggest one your company ever had?

A It is the largest single government contract we ever had, yes.

Q And Mr. Iaconetti came there from the General Services administration, isn't that so?

A Yes.

Q So he was only talking to you about the government bid and not about your commercial business?

1
2 gave an indication of my confidence that we would be able
3 to perform under the contract.

4 Q During all your conversations with Mr.
5 Iaconetti, isn't it a fact you told him the company could
6 perform under the contract?

7 A Yes.

8 Q There never was any doubt that you could
9 perform, in your mind?

10 A None.

11 Q Now, when Mr. Iaconetti came to your office
12 on the 10th, after he left Mr. Babiuk's office, did he
13 discuss with you any problems that your company might have
14 under the bid you had made?

15 A When was this?

16 Q On the 10th, when he came into your office
17 after he left Mr. Babiuk's office.

18 A Yes.

19 Q Did he have any conversation relative to
20 the bid made by you?

21 A Only to the extent -- not to the extent --
22 I said I see you seem to be having problems. I said, "I
23 am sure that we can discuss them and I am sure we can
24 satisfy GSA requirements. What are the problems?"

25 And this was a question of mine that wasn't

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A May I go back again?

Q Yes or no, please, sir.

THE COURT: No, the question may be misleading.

MR. DICKER: I don't want any misleading questions.

A How was that, again?

Q Page 21, you described envelopes being a lowly product and what you meant by that, did you explain that to Mr. Iaconetti, is my question?

A No, I did not explain or define in the conversation what I meant by a lowly product.

Q Mr. Lioi, after Mr. Iaconetti left your office late in the afternoon of February 11th, did you telephone him on the 12th?

A No, I did not telephone him on the 12th. Wait. Can -- The 12th would be the following day, Wednesday?

Q Yes.

A No, I did not.

Q Did you speak to Mr. Iaconetti on the 13th or 14th?

A It was one of those days, to the best of my recollection, that Mr. Iaconetti called me. I mentioned this earlier. The first call to me after our Tuesday meeting in my office, and just asked me had anyone from the

Lioi-cross/Dicker

225

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2 GSA contacted me, and I said no, and Mr. Iaconetti said,
3 "Oh, because that was hand carried upstairs. The survey
4 was hand carried upstairs," and something to the effect that
5 "I upped the capacity of your plant a good bit."

6 Q Did he tell you that he had written a
7 favorable report for your company, his facility report?

8 A Yes. That was the implication. He didn't
9 say specifically. When he said, "I upped your capacity a
10 good bit," that means that he had written up the total
11 number of envelopes we can produce beyond what we could
12 actually produce.

13 Q At that time, you knew you had a favorable
14 report from Mr. Iaconetti?

15 A Yes, that was my impression at that time.

16 Q Are you aware, sir, how the procedure works
17 in the General Service Administration after the plant
18 facility report is submitted by the inspector?

19 A I would not say that I am aware in any great
20 detail the internal flow of paperwork, no.

21 Q Are you aware that after the plant facility --
22 withdrawn.

23 Are you aware what the next step is after
24 the plant facility report is favorable relative to the
25 contract?

Lioi-cross

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A I am not aware of the procedures within the GSA after the pre-award survey is conducted, no.

Q Again, Mr. Lioi, do you recall testifying on March 11, 1975 before a grand jury?

A Yes.

Q Page 8.

I refer you to your statement commencing on Line 18:

"So this pre-award survey audit is conducted before the contract is actually awarded. Once that is conducted, if you meet with all of the requirements, then a favorable report is rendered. Then you will actually receive an award of a contract. Now it is officially yours."

A Yes.

Q So that you knew then what happens after a pre-award survey is submitted by the GSA inspector?

A No. In answer to your earlier question, it is still no. I don't know what happens in the GSA. I know once I get the award, once a favorable report is rendered, if they approve it.

Q If the report is favorable then the company is awarded the contract?

A That is the end product. That is so.

Lioi-cross

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2 Q Did anyone assist you when you took the tape
3 out of the machine?

4 A Yes. One of my two associates was in the
5 room with me.

6 Q What did you then do with the tape?

7 A I rewound the tape to the beginning. That's
8 what I did, I rewound it to the beginning.

9 Q Was this the first time you used that voice
10 activated recorder?

11 A I had never recorded a conversation in my
12 office before that conversation, no.

13 Q Did you ever rewind tape on that machine?

14 A Yes.

15 Q How many times?

16 A I couldn't say.

17 Q What did you do with the tape after you
18 rewound it?

19 A I listened to the tape myself from beginning
20 to end.

21 Q Anybody else with you when you listened?

22 A Yes, my two associates.

23 Q You played the tape again?

24 A Yes.

25 Q How many times?

Lioi-cross

- 1
- 2 A Once. Only that once.
- 3 Q Did you rewind it after you played it again?
- 4 A Yes.
- 5 Q Then what did you do with the tape?
- 6 A I turned the tape over to --
- 7 Q What did you do with the tape after you
- 8 replayed it and rewound it?
- 9 A Nothing. Physically?
- 10 Q Yes.
- 11 A Nothing.
- 12 Q Did you leave it on your desk?
- 13 A No.
- 14 Q Where did you put it?
- 15 A I locked it in a credenza in my office.
- 16 Q Did you place it in an envelope or leave the
- 17 tape on the reel?
- 18 A The tape remained in the machine in its
- 19 rewound position located in my credenza.
- 20 Q When did you next see the tape?
- 21 A It was either the following day or the day
- 22 after when I next saw the tape.
- 23 Q Did you at that time turn the tape over to
- 24 anyone else?
- 25 A Yes.

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Lici - Cross/Dicker

253

A Yes, I did.

Q On the 10th, did Mr. Iaconetti come back to your office after lunch?

A Previously, yes.

Q Was the voice activator recorder on then?

A I am not certain whether it was on when he came back into my office after lunch.

Q Didn't you set it up after he left your office on the morning of the 10th?

A Let me correct --

Q Did you did you not --

THE COURT: Excuse me. The witness is to be allowed to correct an answer.

A The response to your previous question is no, it was not on. It was in my desk. I had placed it in my desk because it was not in the "on" position.

Q You knew that Mr. Iaconetti was still in the office after you had placed it in your desk and it was in the "on" position as you say?

A It was not in the "on" position.

Q I'm sorry.

But it was in the "on" position on February 11th?

A That is correct.

Q Now, when did Mr. Iaconetti leave the office on

Pionzio - direct

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Q Relative to the bidder?

Is there a financial report required?

A Well, can I go back and explain the procedure?

Q Yes, please do.

Q When the Pre-Award Survey is completed to the satisfaction of the QAS, he in turn forwards it to his Supervisor, who reviews it for completeness, and sees that all the areas are covered. If there are any questions that come up as a result of his review, he contacts the QAS, and they resolve these questions, and thus clarifies the report so that it is clearly affirmative or negative, and there is no doubt in anybody's mind.

The Report is then forwarded to the Contracting Officer's shop, or the Procurement shop or division -- Excuse my terminology -- who in turn couples this with other information that he must require. Excuse my ignorance, I am not in Procurement, I know there is a certain dollar limitation that if the bid or the solicitation exceeds a certain dollar value then he must go out and get a financial report.

Okay.

When he receives our Report, and he gets a financial report, and maybe an EEO Report -- an Equal Employment Opportunities Report -- and any extraneous data he may have to have to arrive at a determination, he marries this

Pionzio - direct

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all together and he arrives at a determination as to whether or not that bidder is to be awarded the contract.

Q Who makes that determination, does the Quality Assurance Specialist make that determination?

A No.

Q Does he have anything at all to do with it, other than the making of his Plant Facilities Report, with the awarding of the contract?

A No.

Q Now, Mr. Pionzio, assuming that the Plant Facilities Report is forwarded by the Quality Assurance Specialist, and is favorable, but the financial report and the Equal Opportunity compliance are both unfavorable.

Will a contract be issued favorable to the bidder?

A To the best of my knowledge, no.

THE COURT: Excuse me --

THE WITNESS: I am sorry.

THE COURT: You don't have to answer it if you don't know.

THE WITNESS: Oh, okay.

Thank you.

THE COURT: If you are not sure, just say, I am not sure, or, I don't know.

Radio - direct

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A I am not sure.

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Q But is the Plant Facility Report the sole determining factor as to the issuance of a contract?

4

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A No.

6

Q In your capacity as the Branch Chief in the Quality Assurance Division, is it possible for a favorable Plant Facilities Report to be overruled by you or the immediate superior of the Quality Assurance Specialist?

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A Yes.

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MR. DICKER: I have no further questions at this time.

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MP fls 14

(continued on next page.)

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EXCERPTS FROM TRIAL TRANSCRIPT--PORTIONS OF TESTIMONY OF
HARRY D. IACONETTI (DEFENDANT)

450

Iaconetti-direct

1 A Yes, I did.

2 Q When was the first pre-award survey you made
3 for the Champion Envelope Company?
4

5 A In January 1973.

6 Q When was the second pre-award survey that you
7 made?

8 A Early in 1974.

9 Q In February of 1975, you made a third pre-
10 award survey?

11 A Yes.

12 Q You were present in court and you heard
13 Mr. Lioi say there was only one prior pre-award survey?

14 A Yes.

15 Q Was that accurate?

16 A No, sir.

17 Q Do you recall the amount of the bid that was
18 involved in the first pre-award survey?

19 A Approximately eighteen thousand dollars.

20 Q In the second, not the one on February 11th --

21 A Approximately twenty-two thousand dollars.

22 Q So none of those pre-award surveys that you
23 did with the Champion Envelope Company involved anything
24 more than twenty-two thousand dollars; is that correct?

25 A That is correct, sir.

Iaconetti-direct

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Q What did he say to you about that particular matter?

A That he and his two brothers actually originated the company. And that was approximately seventeen or eighteen years ago.

Q Did he say anything further about whether he had any interest in the corporation?

A Yes, he did.

Q What did he say, specifically?

A Well, mainly his ownership is what he discussed.

Q I'm sorry?

A His portion of ownership.

Q What did he say relative to that?

A That he was one-third owner.

Q Now, subsequent to August or September of 1970, did Mr. Sonner ever say anything to you relative to that that would indicate there had been any change?

A No.

Q Now, Mr. Iaconetti, in October of 1974, did you have occasion to speak to Mr. Sonner relative to the contract that he had with the Government -- with the General Services Administration?

A Yes, I did.

1 2
2 specifications and your special records are not the way the
3 standard spells it out." He said, "Well, look Harry, how
4 about if I give you \$1,000 and just, you know, take care of
5 those inadequacies for me." I started laughing. I thought
6 it was a joke figuring that Mr. Lioi knows darn well that
7 this is nothing detrimental. It certainly can be corrected
8 easily and a sum of \$1,000 was astronomical to offer. He
9 repeated it again.

10 Q What did he say to you, Mr. Iaconetti, and
11 what did you say specifically to him?

12 A He said, "Look, Harry, I don't want nothing to
13 go wrong with this contract even though it might seem trivial
14 but I want it to be perfect so it's worth \$1,000 to me if
15 you could just overlook these little inadequacies and take
16 care of them for me." I told him --

17 Q I'm sorry --

18 A I told him I would, anyway. That's our job.

19 Q When a contractor is good in all other aspects
20 certainly the record keeping and the inadequacies of the
21 proper standards could be easily corrected without too much
22 problem and showing him how to use the standards. It
23 behooves me to do this.

24 Q Was there any further conversation relative to
25 that, Mr. Iaconetti?

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A Yes, he again made the offer --

Q Of what?

A Of giving me \$1,000 to remove this blemish.

Q When you say he again made the offer, please tell us what he said to you and what you said to him.

A He says, "Well, look \$1,000 isn't much. After all, it's a million and a quarter and it just removes all blemishes."

Q What did you say?

A Well, at that point, I got very concerned. I realized at this point Mr. Lioi wasn't joking anymore and that's a very serious thing to try to make an offer to any government employee.

Q And did you say anything to him?

A I says, "Well, look, Mike, evidently you feel somewhere here that your contract is in jeopardy and it's not and I wouldn't pursue this kind of a situation here. It's a little embarrassing and a little insulting at the same time."

Q What did he say?

A He said, "Sometimes when little things are written on a report and somebody catches it -- not you, but somebody else -- they might look at it a little differently. That's why I would like that off there.

Iaconetti-direct

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1 4
2 Q Did he say anything to you that he wanted the
3 contract for his company?

4 A Yes, he said he didn't want to lose this. It
5 was the biggest one he ever had and he just wants this very
6 badly.

7 Q Did you say anything further to him after that,
8 Mr. Iaconetti?

9 A Well, I guess at that point when I realized
10 the seriousness of this -- I had recalled some conversations
11 where contractors have offered some money to people regard-
12 less of whether they work for the government or whatever
13 favors could be done as such.

14 I decided at that point that I wanted to
15 collect the facts and the data and the evidence concerning
16 this offer.

17 Q And did you then say anything further to Mr.
18 Lioi?

19 A I said that we shouldn't pursue this unless --
20 you are -- I mean you are so upset about it or are you
21 upset? He said, "No, I am not upset. I just don't like any
22 blemishes."

23 Q What happened after that?

24 A Well, I thought about it for the moment figuring
25 that maybe Mr. Lioi didn't realize the seriousness of it and

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Iaconetti-direct

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maybe I could discourage him completely from pursuing that direction of offer.

I even joked back figuring maybe I will make him admit it was a joke or something. I says, "Well, a contract like that, \$1,000 to remove a blemish, make it two make it 20." He says, "No, one is fine, I just want to obliterate this inadequacy we have and it will be all straightened out, we will take care of it."

Q Did you say anything to him at that time about the plant facilities report.

A Yes, I told him that's very good. We didn't have any sweat concerning the -- the man-hour was excellent, the machinery was excellent, the capability was there, all we had evaluated that day except for the inadequacy of the federal standard and the Mill Standard 105.

Q Did you have any further discussion with him about money?

A I had asked whether he was doing this on his own or his partners -- I started to collect data and wanted to know if he was alone in the offer or his partners were part of the offer, so when the right time came, I could support this information to our office, the office of compliance of GSA.

Q Did he say anything in response to that?

A He sort of led me into further discussion and

Iaconetti-cross

and Mr. Sonner-- in fact, you had no particular need for funds, is that a fair statement?

A Yes.

Q I think you also told us your wife worked in addition to yourself, and now you said she worked for the telephone company?

A Yes, sir.

Q Do you know, sir, what your wife currently makes in terms of --

A Excess of \$12,000 a year.

Q Approximately in February of this year, what was your salary?

A In excess of \$19,000.

Q We are talking about roughly \$30,000 of gross income; is that a fair statement?

A Yes.

Q Do you drive an El Dorado Cadillac?

A I purchased an El Dorado Cadillac three years after someone else had it.

Q Mr. Iaconetti, do you now drive an El Dorado Cadillac?

A Presently, yes.

Q Mr. Iaconetti, currently could you give us some idea as to your financial obligations? Do you have a

5 Iaconetti-cross

home mortgage?

A Yes, I do.

MR. DICKER: What time is this? You mean now,
February, last year?

MR. DEARIE: I will be more specific.

MR. DICKER: Thank you.

Q Do you currently have a home mortgage?

A Yes.

Q On the East Flatbush residence?

A Yes.

Q Did you have this home mortgage February of
1975?

A Yes.

Q Did you have the home mortgage in October 1974?

A Yes, sir.

Q Could you tell us the amount of that mortgage?

A It has recently been upped to \$300 a month but
it was approximately \$270.

Q Did you maintain any other loans during the
period of October '74 to February 1975 of any kind?

A Loans?

Q Outstanding loans, debts.

A Yes, when I purchased the car I took a loan
on the vehicle.

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Iaconetti-cross

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Q Anything further?

A Oh, while I was doing renovation on my home I took another small loan.

Q Could you tell us the approximate amount of your auto loan?

A Approximately \$5,000.

Q The monthly payments, if you will?

A I believe that was \$180 a month.

Q When did that auto loan terminate?

A I would say about five months or six months ago.

Q In August of '75?

A I am not sure. I would have to look at the loan payment book.

Q Did you have an additional loan that terminated in March of 1975 for the sum of \$234?

A That's the home renovation.

Q An additional loan with the Chase Manhattan?

THE COURT: \$234, do you mean that is the payment a month?

MR. DEARIE: Yes.

Q Mr. Iaconetti, did you have occasion to have a loan involving a \$232 monthly payment with the Chase Manhattan Bank that terminated in April of 1975?

7

A How much was that amount?

Q Approximately \$232.77.

A That was the loan we are speaking of now.

Q Yes.

A One loan, fine, yes, sir.

THE COURT: I am confused.

THE WITNESS: So am I.

MR. DEARIE: May I start again?

THE COURT: Yes.

Q Mr. Iaconetti, you told us you had a loan for \$180 for your car?

A Yes.

Q I think you told us that loan terminated several months back?

A Yes.

Q I think you told us you had a second loan involving \$234 a month payment to the Franklin National Bank that ended in March of 1975 for your house?

A Yes, the home loan.

Q Thirdly, did you just tell us that now you had an additional loan with the Chase Manhattan Bank ending April 1975 involving a monthly payment of \$232.77?

A I believe that is so, yes.

Q That is the third loan, is that correct?

8

Iaconetti-cross

543

A Yes.

Q Mr. Iaconetti, you also told us you had a \$271 per month mortgage payment?

A That is correct.

Q And did you have an additional loan that terminated on May 7 -- withdrawn.

Mr. Iaconetti, when your lease had terminated on Apartment 20 at 115 Jamaica Avenue, what was your current rent?

A I think at that time with the increases in ten or eleven years, it was approximately some \$100-odd. I do not remember exactly.

Q \$119?

A That sounds right.

Q That was per month, is that right?

A Per month, yes.

Q May I take you back to October 1974, specifically October 22, 1974 in connection with Lightalarms Electronics Corporation.

A Yes.

Q You testified, sir, if I recall correctly, that on the 22nd day of that month you placed a telephone call to a Mr. Lou Sonner?

A Yes, I did.

K:m T.2/1

A-81
COURT'S CHARGE TO JURY
AFTERNOON SESSION

937

JB#3pm

(2:30 pm)

1
2 THE COURT: All right, bring in the jury,
3 please.

4 (The jury enters the jury box.)

5 THE COURT: Whose ankle was injured?

6 JUROR NO. 6: My knee, sir.

7 THE COURT: Do you feel all right?

8 JUROR NO. 6: I think I can go through
9 with it. I can go through with it.

10 THE COURT: You may have to come back
11 tomorrow. I don't want you to rush or do anything
12 that would jeopardize anybody's rights.

13 Do you understand that?

14 JUROR NO. 6: I do, sir.

15 THE COURT: All right. If at any time you
16 feel uncomfortable, let me know.

17 Ladies and gentlemen of the jury, I am
18 now going to instruct you with respect to the
19 law of the case and I want you to follow my
20 instructions. You will decide the facts.
21 Nothing I have said or done should suggest to
22 you in any way my view of the facts or my view of
23 the guilt or innocence of the defendant. My sole
24 function here is to see that you decide the case
25 fairly, and you assume that I have no view with

Charge

respect to guilt or innocence.

There are a number of instances in which I ruled on objections. The objections were properly made, and you are not to take any actions of any of the attorneys as bearing on the guilt or innocence of the defendant. Again, they were doing their job and nothing that they said or did bears on the evidence before you, except insofar as they helped you analyze that evidence.

You are not to be considering any material that was stricken or any answers that I did not allow to be given. If I sustained an objection, you are not to consider the question. It is the answer that counts.

The fact that this was a prosecution brought in the name of the United States is not entitled to any weight at all. The Government and the defendant are equal in this court. No party is entitled to any sympathy or favor.

The indictment is an accusation in writing, and it is not evidence of guilt. It is just a way of bringing a case into court, as I explained to you at the outset.

This defendant has pled not guilty to all of

Charge

the counts. He is presumed to be innocent of all of those counts, and that presumption of innocence remains with him throughout the trial and into your deliberations and should be considered by you when you deliberate.

The Government has the burden of proving guilt beyond a reasonable doubt with respect to every element of the crime the defendant is charged with committing, and you will have to consider every element in connection with each of the five crimes.

A defendant does not have to prove himself innocent, nor does he have to submit any evidence, because he is presumed to be innocent. The burden of proof beyond a reasonable doubt lies on the Government and continues throughout the trial.

A reasonable doubt means a doubt sufficient to cause a prudent person to hesitate to act in the most important affairs of his or her life.

Finding a citizen to be guilty of a felony and subjecting him to the possibility of criminal penalties is serious, and you will consider this fact in deciding whether you have a reasonable doubt. Nevertheless, if you are convinced beyond a reasonable

Charge

doubt of the defendant's guilt, you should find him guilty and not be swayed by any consideration of sympathy.

In evaluating the evidence, you are going to have to rely upon your own common sense and general experience in this case.

This defendant is charged with committing five separate crimes arising from the alleged solicitations of bribes from two corporations in 1974 and 1975. Each alleged crime or count and the evidence pertaining to it should be considered separately by you, and a separate verdict should be returned as to each count, but of course you are free and you should consider the evidence with respect to one of the events in considering whether the evidence with respect to the other event is credible. That is, all the evidence in the case can be considered with respect to each of the five counts.

I am going to read now from the indictment. Count One, which charges the defendant with soliciting a bribe from Champion Envelope Manufacturing Company, reads as follows:

"Count One. On or about the 10th day of February, 1975 and the 11th day of February, 1975,

Charge

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2 both dates being approximate and inclusive, within
3 the Eastern District of New York, the defendant
4 Harry Dominick Iaconetti, being a public official
5 as defined in Section 201(a), Title 18, United States
6 Code, did knowingly, willfully, unlawfully, directly
7 and corruptly ask and solicit from Champion Envelope
8 Manufacturing Company, Inc. approximately \$9,500 for
9 himself in return for the defendant Harry Dominick
10 Iaconetti's being influenced in the performance of
11 his official acts."

12 Now, the exact date and the exact amounts
13 involved are not critical. They are approximations.

14 Count Four is exactly the same except that
15 it is alleged that the defendant solicited an un-
16 specified amount of money from Lightalarms Electronics
17 Corporation in 1974.

18 The provision of the law regarding soliciting
19 a bribe is Title 18 of the United States Code,
20 Section 201(c), which provides in relevant part that,

21 "Whoever, being a public official or person
22 selected to be a public official, directly or
23 indirectly, corruptly asks, demands, exacts,
24 solicits, seeks, accepts, receives, or agrees to
25 receive anything of value for himself or for any

1
2 other person or entity, in return for being influenced
3 in his performance" of his duty in connection with
4 any official act shall be guilty of a felony.

5 The statute defines a public official as
6 follows: "an officer or employee or person acting
7 for or on behalf of the United States, or any
8 department, agency or branch of Government thereof,...
9 in any official function, under or by authority of
10 any such department, agency or branch of Government."
11 You may find that a quality assurance specialist
12 of the General Services Administration is a public
13 official.

14 This statute defines "official act" as
15 follows: "...any decision or action on any question
16 matter, cause, suit, proceeding or controversy, which
17 may at any time be pending, or which may by law be
18 brought before any public official, in his capacity,
19 or in his place of trust or profit."

20 You may find that a quality assurance
21 specialist executing a plant facilities report or
22 inspection or activity in connection with that is
23 doing an official act.

24 There are three essential elements required
25 to prove beyond a reasonable doubt this offense of

Charge

solicitation of a bribe. First, the act of soliciting anything of value by a public official, as charge in the indictment. Here you would have to find that the defendant solicited money from the witness Lioi or from the witness Sonner.

You may find that the defendant was acting as a public official conducting official activities when he evaluated these two businesses for the purpose of awarding government contracts.

Second, the doing of such an act willfully and corruptly; and

Third, the doing of such act with the intent on the part of the public official that the requested payment be in return for being influenced in his performance of any official act.

To answer those second and third points, you have to determine what was in the defendant's mind and what motivated his conduct at the times in question.

An act is done willfully if it is done voluntarily and intentionally and with the specific intent to do something the law forbids; that is to say, with a bad purpose either to disobey or disregard the law with respect to bribery.

Charge

944

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2 To act corruptly is ordinarily to act with
3 the hope or expectation of either financial gain or
4 other benefit to oneself, or some aid or profit or
5 benefit to another. So a person acts corruptly
6 whenever he willfully solicits money or anything of
7 value to be influenced in his official action as a
8 public official. It does not matter that the person
9 soliciting the bribe intends to turn over all or part
10 of it to another person or persons.

11 To act with an intent to influence means to
12 act with the specific intent to affect or to have an
13 effect on conduct or actions. In considering this
14 element you are called upon to determine again what
15 was in the defendant's mind and the purpose which
16 motivated him in his conduct.

17 Although the Government must prove beyond a
18 reasonable doubt that any request for money, if it
19 was made, was made with the understanding of the
20 defendant that it was meant to influence an official
21 act of his as a public official. himself and acting
22 with others, it is not an element of the crime, and
23 the Government need not prove that the defendant or
24 anyone else was in fact influenced or that he or
25 anybody else changed or altered his actions in any

Charge

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2 way, or that any service was in fact performed
3 in connection with these events that otherwise
4 would not have been performed in a perfectly legal
5 and acceptable way.

6 The Government need only prove that something
7 of value was solicited or received in return for,
8 and for the purpose of, and with the intent of,
9 being influenced in an official act, and, as I say,
10 it makes no difference whether the acts intended to
11 be influenced were in fact influenced, or that the
12 object of the bribe could not be obtained or was
13 not obtained, or that if the act were done it turned
14 out that there had been actually no need or occasion
15 to seek to influence any official conduct. It is
16 the corrupt solicitation or receiving of money with
17 intent to be influenced in an official act that
18 constitutes the offense.

19 Moreover, in considering the guilt or innocence
20 of a defendant who is accused of bribery, it makes
21 no difference that the object of the bribe is itself
22 lawful activity. That is, that the company was not
23 doing anything wrong or the Government would have
24 gotten good value for its money, in any event. The
25 purpose of the law is to protect the integrity of

Charge

official acts against the possible temptation to act in other than a proper manner which may result from the payment of money to influence such an official act.

Count Two charges the defendant with receiving a bribe from Champion, and I will read it to you also, as follows:

"Count Two. On or about the 24th day of February, 1975, within the Eastern District of New York, the defendant Harry Dominich Iaconetti, being a public official as defined...did knowingly, willfully, unlawfully, directly and corruptly accept and receive from Champion Envelope Manufacturing Company approximately \$3,000 for himself in return for the defendant Harry Dominick Iaconetti's being influenced in the performance of his official acts."

The same statutory section I read to you in connection with Counts One and Four is the basis for this felony charge in Count Two. So what I have said to you about who a public official is and what an official act is, as defined in that count, applies to this Count 2 as well. Here, too, there are three essential elements that must be proved beyond a reasonable doubt in order to establish the offense

1 of receiving a bribe in violation of the law.

2
3 First, the act of receiving anything of value
4 by a public official, as charged in the indictment,
5 and here you would have to find that the defendant
6 took money from Mr. Lioi.

7 "Taking" here means that the defendant
8 exercised voluntary control over it. It is not
9 necessary that he actually touch it or put it in
10 his pocket or that he spend it or put it in the
11 bank or anything like that. If he directed someone
12 to put it in his car and it was placed there at a
13 time when he intended it to be placed there, so
14 that he could control it and use it for his own
15 personal benefit or the benefit of another person
16 and not with the purpose of turning it over as
17 evidence, you may find that the defendant took the
18 money. Again, you may find that he was acting as
19 a public official doing official work at this time.

20 The second and third elements are identical
21 to those already covered in connection with the first
22 count.

23 Second, that he was doing the act willfully
24 and corruptly.

25 And third, that he was doing the act with the

Charge

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2 intent on his part that the payment be in return for
3 being influenced in the performance of an official
4 act.

5 "Willfully," "corruptly," and "intent to
6 influence an official act" have all been defined,
7 and their definitions remain the same. Again, it
8 is not necessary for the Government to prove that
9 Champion received any benefit from any of the alleged
10 payments or that they would have received any
11 benefits from Mr. Iaconetti. It does not make any
12 difference whether Mr. Iaconetti would have himself
13 kept that money or given it to a co-conspirator,
14 one of the higher-ups, if there were any such people.
15 It doesn't make any difference. If, however, his
16 intention was to turn that money over as evidence
17 to an official as he testified, then he couldn't be
18 guilty of this crime. The burden of proof beyond
19 a reasonable doubt is, as I say, on the Government.

20 Count Three is an extortion count. It charges
21 the defendant with attempting to extort money from
22 Champion, and it reads as follows:

23 "From on or about the 10th day of February,
24 1975 up to and including the 24th day of February,
25 1975, both dates being approximate and inclusive,

1 within the Eastern District of New York, the
2 defendant Harry Dominick Iaconetti did unlawfully,
3 willfully and knowingly attempt to obstruct, delay
4 and affect commerce, as that term is defined in
5 Section 1951 of Title 18, United States Code, and
6 the movement of articles and commodities in such
7 commerce, by attempting extortion, as that term is
8 defined in the Code, in that the defendant Harry
9 Dominick Iaconetti attempted to obtain a sum of
10 money not due him or his office from and with the
11 consent of Champion Envelope Manufacturing Company,
12 Inc., such consent to be induced under color of
13 official right and by fear of economic loss."

x
14
15 Count Five is exactly the same except it refers
16 to an attempt to extort money from Lightalarms in
17 1974. Now, the particular section involved is
18 Section 1951 of Title 18, and it reads in pertinent
19 part as follows:

20 "Whoever in any way or degree obstructs,
21 delays, or affects commerce or the movement of any
22 article or commodity in commerce, by extortion or
23 attempts or conspires so to do"...shall be guilty
24 of an offense against the United States.

25 And it defines the term "extortion" to mean

Charge

"the obtaining of property from another, with his consent, induced by wrongful use of...fear, or under color of official right."

And the term "commerce" means "all commerce between any point in the state...and any point outside" of that state.

Here, too, there have to be three essential elements established beyond a reasonable doubt to prove extortion:

First, that the defendant attempted to induce his victims to part with property, attempted to get money from them;

Second, that he did so by attempting "extortion" as I shall define this word to you in these instructions; and

Third, that if he had succeeded in extorting property from his victims, interstate commerce would have been delayed, interrupted, or adversely affected.

The first element of the offense is that the defendant attempted to obtain sums of money from Champion and Lightalarms. When the Government has charged a defendant with attempting to obtain the property of another by means of extortion, it is not

Charge

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2 necessary for the Government to show that the person
3 who attempted the act would have derived any direct
4 benefit himself. "Extortion," as defined by the
5 statute prohibits the taking of the property of
6 another either for one's own benefit or for the
7 benefit of someone else.

8 The second required element is that the
9 defendant must have tried to induce his victims to
10 part with their property by means of extortion. The
11 term extortion has a precise legal meaning, which is
12 defined in the statute, and I am going to read it
13 again. The term "extortion" means "the obtaining
14 of property from another, with his consent, induced
15 by wrongful use of fear, or under color of official
16 right."

17 The term "extortion" means the obtaining of
18 property from another with his consent induced
19 either by wrongful use of fear or under color of
20 official right. The term "fear" as used in the
21 statute has the commonly accepted meaning. It is
22 a state of anxious concern, alarm, apprehension or
23 the like, of anticipated harm to a business or of
24 a threatened loss to a business. That is, fear of
25 economic loss is included. Extortion under color

1 of official right is the wrongful taking by a
2 public officer of money not due him or his office.
3 If a victim reasonably feels compelled to pay money
4 to a law enforcement officer, because of that officer's
5 wrongful use of his official position for the purpose
6 of obtaining money, the requirements of the crime of
7 extortion under color of official right are satis-
8 fied. It is not necessary for conviction for the
9 Government to show that the defendant had the power
10 to withhold a contract or prevent the shipment of
11 goods. The issue is not whether the defendant had
12 the power to do any harm to these companies, it is
13 whether it was reasonable for the alleged victims
14 to have had that belief and to have acted because of
15 fear of economic harm induced by the defendant.
16

17 You will note that extortion as defined by
18 federal law is committed when property is obtained
19 by consent of the victim by wrongful use of fear,
20 or when it is obtained under color of official
21 right, and in either instance the offense of extor-
22 tion is committed.

23 The third and final element which you must
24 determine is that the government has proved beyond
25 a reasonable doubt that if successful, interstate

Charge

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2 commerce would have been delayed or adversely
3 affected in any way or degree, even to a minim
4 degree.

5 You must then find that the acts of defendant
6 would have affected such commerce. No conscious
7 purpose of obstructing interstate commerce need be
8 shown. It is only necessary to show a plan of extor-
9 tionate behavior which is likely to have the natural
10 effect of obstructing commerce.

11 No major disruption, obstruction or adverse
12 effect is required. Interstate commerce does not
13 actually have to be reduced; it is enough if business
14 might be shifted from one envelope manufacturer to
15 another or from one security light manufacturer
16 to another.

17 Interstate commerce may also be adversely
18 affected if by an increase in the cost of doing
19 business in interstate commerce, or by the reduction
20 of the profits from interstate business there is an
21 adverse effect on companies or a company which deals
22 in interstate commerce.

23 There was testimony, as you recall, that
24 Champion had suppliers all over the country and was
25 soliciting business in other parts of the country.

Charge

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2 and there was also Lightalarms evidence of the same
3 kind. There was also testimony that GSA bought for
4 federal installations all over the country. If you
5 believed these witnesses when they testified, you
6 may find that interference with the proposed
7 government contracts here involved would have
8 adversely affected interstate commerce. So much
9 for the law defining those five offenses.

10 Obviously, having sat here for a number of
11 days, you realize that the difficult aspect of your'
12 work is to determine the credibility of the wit-
13 nesses, and in weighing their testimony you may con-
14 sider their relationship to the Government or to the
15 defendant, the witnesses' bias or interest in the
16 outcome of the case, the manner he or she-- Well,
17 did we have any female witnesses? I don't think we
18 did.

19 MR. DICKER: No, sir.

20 THE COURT: I don't think we did in this case.
21 The manner in which he testified, his candor and
22 intelligence as you observed it of the witness,
23 whether he has been corroborated by other evidence,
24 the documents or the tapes or transcript, whether
25 contradicted by that evidence, whether there has been

Charge

1 a change of testimony under cross-examination or from
2 time to time during the course of events.

3
4 If you believe that a witness has willfully
5 sworn falsely you may disregard his testimony com-
6 pletely, but you may accept part of it because
7 witnesses may be mistaken in part and accurate in
8 other parts.

9 The defendant testified that he did not take
10 any money and that he at all times acted properly
11 without being influenced by the witnesses. He has
12 an interest in his own acquittal and his testimony
13 must be scrutinized, or should be scrutinized with
14 that fact in mind.

15 You are not to give any greater weight or
16 credibility to the testimony of the federal GSA
17 official or officials here who testified, or to
18 any other official because of his official position.
19 The testimony of every witness is to be evaluated
20 without respect to position, and based upon what y
21 see and hear and know about how people act generally.

22 A government and a defense witness testified
23 as experts about the procedures for evaluating cor-
24 porations with respect to the awarding of government
25 contracts. They also were expert witnesses, or you
may so find that they had information that you other-

Charge

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2 wise would not have had. They did know this special
3 field, of course, and you should consider their con-
4 clusions and opinions and give them the weight that
5 you think they are entitled to.

6 The number of witnesses or documents or other
7 exhibits is not, of course, conclusive. It is the
8 quality that counts in your evaluation.

9 If you wish to have any of the testimony
10 repeated, please send in a note, and we will try to
11 find it, but try to be precise, because obviously
12 we don't want to read everything back again. If you
13 have real need for it, of course we will be happy
14 to try to find it for you.

15 If you want the tapes played, we will do that,
16 and any of the documents that have been marked in
17 evidence, you may call for, and we will send them
18 in to you, all or any of them that you would like to
19 see.

20 You are entitled, each of you, to your own
21 opinion, but you should exchange views with each
22 other carefully and considerately. While you should
23 not hesitate to change your opinion if you are con-
24 vinced that another opinion is correct, remember your
25 decision must be your own.

Charge

Any verdict must be unanimous with respect to each count. You should take up the counts one by one. You can bring in a verdict on all five at the same time or one at a time, whichever you prefer.

If you want any further help on any legal issue, by all means you come in, ~~athrough a note,~~ and we will try to give you some help.

Your oath sums up your duty, and that is, without fear or favor to any man, you will well and tryly try the issues before these parties according to the evidence given to you in court and according to the laws of the United States.

Now, if the counsel will come to the side bar and discuss the charge.

(Continued on the next page)

JB/LH
lpm/2

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(The following took place at the side bar.)⁹⁵⁸

MR. DICKER: Your Honor, I would like to renew the objections and the exceptions I noted when we had the two conferences heretofore relative to the charges.

THE COURT: Yes.

MR. DICKER: I don't think I have to repeat all of those.

THE COURT: No.

MR. DICKER: And that includes the omissions of some of my request to charge as well.

THE COURT: Yes.

MR. DICKER: And I also heard your Honor add some additional matters that we hadn't gone over with before in the definition of some of the crimes.

THE COURT: Well, you better point them out to me, because if I misspoke I will correct it now. But I'm certainly not going to take that kind of a general exception.

MR. DICKER: All right. Well then, may I also renew my exception to the definition of "taking," as your Honor has on Page 8.

And as to your Honor's remarks, what is required for conviction on Page 13, as well as the -- as well as the last two sentences on Page 13, which I think may

A-103
ARGUMENT AND COURT'S ORAL DECISION ON DEFENDANT'S MOTION ³¹⁵
RE EXCLUSIVITY BETWEEN BRIBERY AND EXTORTION

Mr. Jaffe
3am/4

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THE COURT: The whole testimony is pregnant
explicitly and implicitly with that, and the tape is
pregnant with it.

I just don't understand that point and I don't
credit --

MR. DICKER: Well, your Honor, with all due
respect, you may say is pregnant, but it certainly
hasn't given birth to the fact that there is any fear
of economic loss.

THE COURT: Well, whether there is a birth or
not depends upon the jury.

MR. DICKER: But I am talking about as a matter
of law is what is required to prove beyond a reasonable
doubt or initially to establish a prima facie case
under 1951, and it is my argument that based on some
of the cases that I have cited in my memorandum that I
gave you, and based on the testimony, that they have
not either proven a prima facie case under those two
counts or proved it beyond a reasonable doubt.

THE COURT: Well, I think that is for the jury.

I hold that there is sufficient for a reasonable
juror to find beyond a reasonable doubt those elements.

MR. DICKER: Now, as far as the inclusion in the
indictment of Count 1 and 3 and 4 and 5, in my memoran-
dum I point out that these counts are mutually exclusive.

2

1 THE COURT: I can say on that point that I have
2 read your memorandum, which I got this morning, I
3 haven't had a chance to read the cases, but I don't
4 believe you are right that bribery necessarily excludes
5 fear, because I think inherent in a bribe is the fear
6 that if you don't pay the bribe you are going to get
7 hurt. That's what makes bribing attractive to people.
8 So I don't believe that the concept that you put forth
9 in your brief, admirable as it is and as well stated
10 as it is, that you cannot have coercion and that under
11 bribery it has to be completely voluntary on both sides,
12 which is accurate, but I am going to look into it
13 further.

14 MR. DICKER: The last point --

15 THE COURT: I --

16 MR. DICKER: On that -- may I continue?

17 THE COURT: I was just going to say that I would
18 like very much to have from the Government some cases
19 in which there has been a charge of both bribery and
20 extortion in similar situations and particularly where
21 it has been upheld on appeal.

22 MR. DEARIE: Has your Honor had an opportunity
23 to review our brief on this question?

24 THE COURT: I have just looked at it, are those
25 all the cases there are, are there no other explicit

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3 cases where both are charged?

4 MR. DEARIE: The vast majority of cases arrive
5 out of situations dealing with the question of exclusi-
6 vity and deal with a situation where the payer of the
7 fund is a man being charged with extortion. His
8 defense, of course, is that it was a bribe.

9 Now, the closest we come of New Jersey cases.
10 I will be happy in view of our appointment this after-
11 noon to discuss the charge and go further and see --

12 THE COURT: I would like to see a couple of
13 Court of Appeals cases, if you have them, wherein the
14 same indictment you charged both extortion and bribery
15 in situations analogous to those we have.

16 I am going to give you a proposed charge which
17 you can pick up this afternoon if you would like, it
18 is being xeroxed --

19 MR. DICKER: Yes, sir.

20 THE COURT: (Continuing) and which includes all
21 the counts, but I am not sure that I am going to let
22 both the extortion and bribery counts go to the jury.

23 I don't myself think that there is any harm in
24 letting all of them go to the jury. Certainly it is
25 all one transaction, and I couldn't sentence conse-
cutively on the extortion and bribery counts with
respect to the same transaction.

4

In that respect it is much like the bank robbery cases where you have a count with a weapon and a count without a weapon.

So we can consider it, but I must say I am somewhat troubled by it.

There is one thing that I just don't feel, and that is that the Hobbs Act was intended to cover this situation.

MR. DICKER: That was what I was going to get around to.

THE COURT: If you think it does as it is written and that it is broad enough to include this --

MR. DICKER: It is broad enough to include it but there was a recent determination, the Trotter case and one more which appears to be a limitation to that, and the purpose or the spirit and the intent of 1951 is really a racketeering one in which you are involved either with labor racketeering or usury, loan sharking, and in that particular aspect --

THE COURT: Well, there is that particular aspect to this case, too, which may bring the extortion statute particularly to bear on it, and that is the continued statement of the defendant that he is taking it for somebody else and he is fearful about what somebody else is going to do, which has the odor of a group

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5 extorting money.

MR. DICKER: Well, the elements, well, it is not an exploding bomb to permeate the area so that it can really qualify under that. But to get back to the exclusivity between the bribery and the extortion situation, the very nature of those crimes presupposes a situation where somebody is bribing, he is doing on a voluntary basis, but where you are being extorted, you are doing it on an involuntary basis.

THE COURT: If that is the theory, then I am going to allow both of them to go to the jury because --

MR. DICKER: That is only a part of it.

THE COURT: (continuing) because if I just allow the bribery then you say he doesn't do it voluntarily and he was coerced and then the Government is out, whereas if I just allow the extortion then you argue it is voluntarily and not coercion and then the Government is out under those circumstances, and here is a situation, here you have the same factual situation and the evidence is amenable to an inference of either coercion or a voluntary act. So it seems to me only fair to allow the Government to go to the jury on both.

MR. DICKER: Except, your Honor, as I pointed out in the memorandum, it isn't the question that we

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6 are using the facts in an uncharged crime as a defense
to a charged crime, which is what your Honor may have
intimated just now. The point is --

THE COURT: Not a defense, I am just saying that
if I give the jury the bribery then you can argue that
the Government hasn't proven beyond a reasonable doubt
the voluntary nature and you say maybe it was coercion
but it wasn't voluntary, so don't find him guilty of
bribery. On the other hand if it is just coercion,
then you say, Well, it wasn't coercion because there
is a reasonable doubt as to whether it was voluntary
and therefore you shouldn't find him guilty.

I don't think it is reasonable to do that where
a jury may be convinced beyond a reasonable doubt of
either one or the other.

(Continued on next page.)

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1 MR. DICKER: In the case cited by the Government
2 in its memorandum, in nearly all of those cases as
3 we mentioned, there are not similar counts in the
4 indictment as this.

5 THE COURT: That is the problem I have and I
6 would like very much for the Government to supply me
7 with something closer to this, if it exists.

8 MR. DEARIE: There is one interesting case I
9 did mention, it is in the Second Circuit but the name
10 escapes me, it is in our memorandum, it dealt directly
11 with the more powerful argument where somebody is
12 accused of bribery and the defense is extortion by the
13 person who paid the money, and the Second Circuit didn't
14 go so far as to say it is exclusive but that at the
15 very, very most, the evidence would go solely to his
16 intent, the state of mind and it would not be a
17 defense --

18 THE COURT: Yes, there the person paying.

19 MR. DEARIE: That is a considerably stronger
20 situation than the one we had here.

21 THE COURT: I think that is so, I think that is
22 so, I think the person paying the amount is in an
23 entirely different position because there the defense
24 that it was involuntary in that sense because of
25 coercion makes it so, but to the person taking the

2 1 bribe, what difference does it make whether he is
2 getting it voluntarily or getting it because he is
3 coerced, because whenever there is a request for a
4 bribe, it is also under the implied threat that if you
5 don't give it to me you will be in trouble.

6 MR. DICKER: Well, if your Honor pleases, then
7 there is no need to have Section 1951, which deals
8 with the threat of violence resulting in economic loss,
9 and that is involved and that could affect the purpose
10 of that section.

11 We feel that the Government either has the
12 bribery or the extortion count, they can't have both.

13 THE COURT: It is a troublesome issue and I
14 feel that I am going to have to study it overnight.

15 Now, I have a draft of the charge with all of
16 the counts and I will ask if you come up with any
17 further cases on it, then I will be happy to have
18 them, you can call them into my law clerk.

19 If the defendant can find any cases in which
20 they dismissed one of these counts where both are
21 charged, I would like that, if you find it.

22 MR. DICKER: I didn't find anything specifically
23 on this particular point, the closest case we have is
24 United States against Kabochi, which I have cited on
25 page 8 and where the defendants were charged with

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3 1 extortion, and in that particular case the people who
2 paid the money were willing participants and could
3 hardly be called victims, and there the Circuit Court
4 said, Well, they went on to say that the Court
5 determined that the evidence presented to it was
6 characteristic of bribery and not extortion and there-
7 upon, it dismissed the extortion counts against the
8 recipients or the defendants.

9 Now, in the Government's cases cited in its
10 memorandum, they are trying to show that bribery, when
11 you add the element of fear, then ipso facto it becomes
12 extortion.

13 Well, it is not so, it is a completely different
14 crime with different elements involved in it.

15 THE COURT: There is considerable overlap
16 between the two, and that is the question. I don't
17 believe that they are distinct, there is a very substan-
18 tial area where both apply. I think that that is the
19 difficulty.

20 All right, anything further?

21 MR. DICKER: No.

22 THE COURT: All defendant's motions are denied.
23 Are you prepared to go forward?

24 MR. DICKER: At 2:30 tomorrow, yes, your Honor.
25 I have two witnesses, and not including

1
2 THE COURT: Is there anything further you
3 want to say about the extortion-bribery point? I
4 heard full argument on it yesterday. I looked over
5 the main cases.

6 MR. DEARIE: Well, your Honor, again after we
7 broke yesterday afternoon I took another look in the
8 hopes of finding something and with the exceptions
9 of the cases cited, Kenny and so forth, which I
10 believe is significant in the sense of what the case
11 does not say as opposed to what it might specifically
12 say, as you are aware Kenny involves two conspiracies,
13 Hobbs Act violation, and bribery counts and the Court
14 saw fit to address itself to it.

15 We have authority in the Second Circuit to
16 the effect that the Second Circuit does not accept
17 or buy the mutual exclusivity doctrine.

18 I for one thing for a brief moment thought
19 we were in agreement with these two crimes, that
20 they were not mutually exclusive as presented to
21 the Court for the evidence in the case.

22 I don't think there is anything necessary
23 further that I should say except because they are
24 not mutually exclusive I think we fall back to the
25 basic rule. Each crime requires proof, they are
separate offenses and should be forwarded to the

1 jury. I would ask you to submit all five counts for
2 the jury's consideration.

3 MR. DICKER: The only thing I will say on that
4 is when we left yesterday I thought your Honor had
5 asked Mr. Dearie to come up with any other cases that
6 he might have relative to the situation and it's
7 obvious he hasn't. As we say in our brief, nearly
8 all of them just don't have the two counts. We also
9 point out the basic reason and the differences
10 between the crimes and we don't have a situation where if
11 the extortion is out he can say it's extortion and
12 not bribery. It's clear by virtue of the fact there
13 is no authority that the Government cannot come up
14 with any. We submit the authority shows that the
15 Government must choose either the bribery or
16 extortion count because they are mutually exclusive.

17 MR. DEARIE: There is ample authority, no
18 specific case directly on point, but United States
19 against Barash, United States against Kahn, as well
20 as the case that goes back some time -- the name
21 escapes me --

22 THE COURT: Martin?

23 MR. DEARIE: United States against Martin,
24 yes, I think that is a more compelling argument.
25 The Second Circuit has expressed the opinion that

1 where a man is charged with bribery and extortion,
2 the Second Circuit as Judge Motley's decision says,
3 that might have some bearing on the intent or the
4 mental capacity of the party accused.

5 There is certain authority for the basic
6 proposition that these two offenses as the evidence
7 has shown here before your Honor in this instance
8 are by no means exclusive.

9 THE COURT: Thank you very much, gentlemen.
10 I'm going to allow all five counts to go to the
11 jury. It's quite true that extortion in recent years,
12 particularly following the congressional hearings
13 that led to the Hobbs Act, were connected in the
14 public mind with racketeering, both the cases and
15 historical roots of the doctrine indicate that it is
16 a crime that public officials acting either singly
17 or in combination with other officials can commit.

18 This is made clear beyond any doubt by the
19 statute itself, since it applies only to public
20 officials. The statute defines extortion as "means
21 of obtaining property from another, with his consent
22 ...under color of official right."

23 We have a very good and recent decision in
24 this Court from Judge Neaher in United States against
25 Trotta, 396 F Supp 755, 757, summarizing the line of

1 cases that have construed the phrase "color of
2 official right."

3 I take it that is not reversed?

4 MR. DEARIE: No, that has not as yet been
5 reversed.

6 THE COURT: I will rely upon it as useful
7 authority both because of its fine reasoning and
8 the Judge who decided it.

9 It is clear from the decision of Judge Neaher
10 that Mr. Iaconetti is accused of the traditional
11 type of extortion, quoting from 757: "Recent case
12 law leaves no doubt that the language 'under color of
13 official right' is regarded as broad enough to include
14 within its scope any public official or employee who
15 wrongfully --" and wrongfully is emphasized -- "uses
16 his official position to exact a payment not due him
17 or his office, under circumstances which can be said
18 to affect commerce in any way or degree," citing a
19 number of cases.

20 The statute permits a public official to be
21 convicted of extortion without any proof of "force,
22 violence, or fear." It is the office itself and the
23 power that goes with that office and its misuse that
24 provides the coercive force that constitutes the
25 equivalent of force, violence, or fear.

1 officials or political leaders in New Jersey that
2 were convicted of conspiring under the Hobbs Act
3 through the use of fear and under color of official
4 right. And they were also convicted of conspiring
5 to violate the Travel Act by committing bribery and
6 extortion under the state law.

7 Judge Gibbons of the Third Circuit in Kenny
8 noted: "As long as each crime required proof of a
9 fact not essential to the other, even though the
10 charges arose from a single act or series of acts,
11 or as here a single conspiracy, the defendants could
12 be convicted of both." That quotation appears in the
13 case at page 1215.

14 There is also the case previously averred to
15 in our discussions, Martin against the United States,
16 278 F. 2nd, 913, 1922, where a Federal official was
17 convicted of bribery and extortion.

18 In United States against Umans, 368 F. 2nd,
19 725, Second Circuit 1966, the Court held it was not
20 inconsistent to convict a defendant of bribery and of
21 aiding Government officials in receiving bribes under
22 18 U.S.C. Section 201 and 26 U.S.C. Section 7214(a)(2)
23 since one of the statutes requires proof of an extra
24 element. The crimes, although not bribery and
25 extortion, were in some sense similar and were joined.

When you examine the cases it is difficult to see they should be considered exclusive. That view, as I say, was embodied under the old New York cases but the trend has been clearly away from that line of cases as indicated very effectively by Mr. Stern. Now Judge Stern?

THE COURT: Even in New York, New York Penal Law, 200.15, has abandoned that view as indicated by the Practice Commentary by Hechtman, in McKinney's.

(continued next page)

Phb

1 THE COURT: There are cases involving private
2 persons which contain similar statements about non-
3 exclusivity, including United States against Kahn,
4 472 F. 2d, 272, at 278, Second Circuit 1973, saying
5 that extortion is not a defense to a bribery charge;
6 and United States against Kabot, 295 F. 2d, 848, 854,
7 also a Second Circuit case, 1961, taking the same
8 position.

9 It may very well be that Mr. Iaconetti violated
10 both the bribery and extortion statutes. It's some-
11 what more complicated to give both crimes to the jury
12 but essentially we have a very simple case here, and
13 I see no reason to further simplify it by eliminating
14 the number of counts. I don't believe the jury is
15 going to be confused at all. If they believe the
16 witness for the Government, they will find him guilty.
17 If they believe whatever his statement is, which I
18 have not yet heard, they will find him innocent,
19 probably.

20 There has been some recent indication that the
21 Second Circuit is going to read the extortion statute
22 narrowly. Two cases are United States against Merolla,
23 935 and 959, Second Circuit, decided August 11, 1975,
24 the slip-sheet at page 5531; and perhaps United States
25 against Trotta, 396 F. Supp. 755, already referred to

2 1 as a decision of this district in 1975, but they have
2 no bearing really on the questions before us.

3 I don't myself believe that the Merolla case
4 has any bearing on the case before us with respect to
5 the interstate commerce issue which was the one in
6 that case that the Court was reversed on. I must
7 say that I have some doubt about whether that case
8 was rightly decided by the Court of Appeals. I think
9 the factual statement does not adequately indicate
10 the interstate commerce aspect relied upon by Judge
11 Dooling.

12 In the case before us we have an enormous
13 weight of evidence with respect to the interstate
14 character of events and the impact on interstate
15 commerce. In the first place, the General Services
16 Administration, the evidence shows, and the Court
17 judicially notices, is a national organization which
18 purchases for the United States Government in all its
19 divisions, both in this country and abroad, purchasing
20 hundreds of millions worth of goods from all over the
21 world and ships them all over the world or has them
22 shipped. Anything which interferes with its proper
23 procurement necessarily interferes with interstate
24 commerce. Beyond that, the two suppliers here, the
25 evidence showed, were national organizations which

3 1 purchased their supplies from all parts of the country
2 and shipped to all parts of the country, both to
3 their civilian and government purchasers.

4 I really can't believe that they curious
5 opinion in Marolla has any bearing whatsoever on the
6 case before us.

7 Accordingly, the motions to dismiss any or all
8 of the counts must be denied.

9 Now, let's turn to the charge. I have had the
10 opportunity to go over the Government's request to
11 charge which the Clerk will mark as a Court Exhibit.

12 THE CLERK: Government's request to charge
13 marked Court Exhibit 4.

14 THE COURT: Yesterday, at approximately 3
15 o'clock, my proposed charge was distributed to counsel
16 and of course they had it without the benefit of the
17 Government's request, which will be marked as a Court
18 exhibit.

19 THE CLERK: Marked as Court Exhibit.

20 THE COURT: Counsel have had it since approx-
21 imately 3 o'clock yesterday and had an opportunity to
22 study it.

23 Now, addressing myself first to the Government's
24 request --

25 MR. DICKER: Excuse me, I don't mean to

COURT'S REMARKS RE EXCLUSIVITY BETWEEN BRIBERY
AND EXTORTION

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1 2 very well be a repetition of something that I excepted
2 to originally.

3 THE COURT: Yes, of course.

4 MR. DICKER: Other than that, I have nothing
5 further.

6 MR. DEARIE: I have nothing.

7 (End of side bar.)

8 THE COURT: All right, ladies and gentlemen,
9 the clerk will give the marshal paper and pencil for
10 you. Retire, please and consider your verdict.

11 (Whereupon, the jury retired from the courtroom.)

12 (The following took place at the side bar.)

13 THE COURT: Is there any objection to sending
14 in the indictment? Five counts are difficult to keep
15 in mind.

16 MR. DICKER: I understand that. If they request
17 them, then obviously that's one thing. But I would
18 rather not send them in.

19 THE COURT: Without a request?

20 MR. DICKER: Yes.

21 THE COURT: But if they do, you have no objection?

22 MR. DICKER: Yes. If they want that, certainly.

23 THE COURT: You know, as I was reading this,
24 it occurred to me that if they should come in with both
25 a bribery and the extortion count with a guilty verdict,

1 3 that I can't allow both of them to stand. Not for the
2 reasons you have stated for the defendant, but because
3 of the way they were charged.

4 It seems to me that the distinction really
5 between the bribery count and the extortion count is in
6 the fear component.

7 When you define the extortion, or alternatively
8 as fear or color of official right, and you permit
9 either one of them to support extortion, there really
10 is no distinction between color of official right and
11 the bribery count. They turn out to be identical
12 except for the interstate commerce portion.

13 So it seems to me, if you are going to charge
14 extortion and bribery in the same indictment in a case
15 like this, you really have to drop from the extortion
16 count the color of official right. And that was
17 troublesome to me. Maybe --

18 MR. DEARIE: I think that I see what your Honor
19 is saying. But I think the cases support the theory,
20 at least, common law, the derivative of the color of
21 official right is that the duress originates with
22 the misuse of the office. And, of course, there you
23 do indeed have a difference between the pure bribery
24 situation.

25 In other words, by presentation of his office,

1 4 his official office and by the misuse of that office.

2 THE COURT: Yes.

3 MR. DEARIE: There lies the duress factor.

4 THE COURT: I suppose you could argue that the
5 extortion is wrongful use of the pressure on the
6 part of the defendant, whereas the bribery is in a
7 sense the wrongful attempt to induce by the contractor.

8 MR. DEARIE: Well --

9 MR. DICKER: It goes one step further than that
10 I think. I think we also mentioned when we originally
11 discussed this thing, the difference between -- in a
12 bribe, we have a voluntary situation. And extortion,
13 there is a totally involuntary situation. And that
14 gets back to the point --

15 THE COURT: No, it is not involuntary. Extortion
16 is voluntary, but induced.

17 MR. DICKER: Which makes it involuntary.

18 MR. DEARIE: No.

19 MR. DICKER: He's compelled to do it.

20 MR. DEARIE: I don't think the statute --

21 MR. DICKER: He's doing it voluntarily.

22 THE COURT: I don't think so. I think that
23 got me off the track in the first place. I don't
24 buy your argument. And because I couldn't see your
25 argument, I didn't think of this other aspect.

5 It's a very closed question. If they come in
on both of them, I'm going to choose one or the other,
whichever the Government wants, and sentence him on
only one.

MR. DEARIE: I assume you will give us an
opportunity to address you further because we do get
back to the same point. Although it may involve the
same transaction, there are elements peculiar to each
separate count that we are talking about.

THE COURT: Yes.

MR. DEARIE: I'm not talking about concurrent
or consecutive. I think everybody is in agreement on
that. I think the point is, are they separate offenses.
I think they are. Obviously, they are not multiplicitous
or duplicitous counts which require proof --

THE COURT: Yes, those things seem to be so.
It's an interesting point.

All right. We may not get to that. They may
not find him guilty on any at all or they may find
him on one or two.

MR. DICKER: Yes. Thank you, your Honor.

THE COURT: Very nicely tried on both sides.

MR. DICKER: Thank you.

MR. DEARIE: Thank you

(End of side bar.)

1 COURT'S ORAL DECISION DISMISSING COUNTS 3 AND 5 IN 10
2 THE INDICTMENT AND DENYING DEFENDANT'S MOTION FOR A NEW TRIAL
3 a great deal of anxieties and this is a lesson. I

4 don't think I'll ever forget it as long as I live.

5 THE COURT: Does the Court have anything to
6 add?

7 MR. DEARIE: No, your Honor. I don't believe
8 so.

9 The Court heard the testimony, the Court heard
10 Mr. Iaconetti's testimony. The Court as I believe
11 is aware of the facts that are necessary.

12 I would ask solely that you impose a concurrent
13 sentence to preserve the jury's verdict.

14 I respectfully submit to the Court that you
15 have a sufficient quantum of evidence of this
16 particular man's crime.

17 THE COURT: What about 3 and 5, it does seem
18 to me the defendant has a point. It is essentially
19 the same transaction and I can't see how you can
20 convict him on the bribery and extortion merely for
21 doing the same act. It seems to me that 3 and 5
22 ought to be dismissed. It would be reinstated, if
23 there should be a reversal and a new trial --

24 MR. DEARIE: I think to refine it, 3 as it
25 relates to 1 was -- is the one solicitation count
which opposed to 2, which stands, represents the
actual fee of \$3,000.

1 With respect to 3, 1, 5 and 4, frankly, your
2 Honor, I think the argument can be made on both sides.
3 I do not interpret the case, although it says in a
4 conviction of extortion under color of an official,
5 it does not require proof of fear. We believe that
6 is correct.

7 THE COURT: I believe there was fear and I
8 charge the jury on that issue. I think either theory
9 would be applicable here. But, what concerns me is
10 the problem we have with respect to the bank robbery
11 where you can't be guilty of armed bank robbery and
12 non-armed bank robbery for the same offense.

13 It seems to me that it would be unconscionable
14 to sentence him under counts 3 and 5, it refers to the
15 same act.

16 MR. DEARIE: Your Honor, I believe in the
17 Prints and Gordon series case that dealt with the
18 bank robbery, sought the whole rationale, as I
19 understand it, under Prince and Gordon and the purpose
20 of it was the enumerating of 212, it remove certain
21 loopholes that then existed. So, an armed bank
22 robbery could technically, did not commit the crime
23 of robbery, would not go outside the Federal
24 jurisdiction.

25 Here on the other hand we have two distinct

1 interests, although it may be an argument, it can be
2 made in the sense that the bribery solicitation and
3 the attempted extortion under color of official acts
4 for all intents and purposes, the facts are the same.
5 It would have two different interests. It is the
6 so-called general judgment that Prince and Gordon
7 would I think hold. Sentences run concurrently. The
8 Government would have no objection, after an appeal,
9 to consent to an amended judgment if they should in
10 a sense elect to find Mr. Iaconetti guilty of
11 extortion or solicitation. We have no objection to
12 that.

13 But at this point in time, pending a review
14 by the Circuit, I would prefer that the jury verdict
15 stand, which was based on strong evidence, which I
16 think we all must admit in terms of fear or color
17 of official duty, the evidence was compelling. There
18 was fear. There was abuse of office. There is no
19 question of sufficiency.

20 THE COURT: There is no problem in your mind
21 with respect to counts 1, 2 and 4. You can sustain
22 those on appeals.

23 MR. DEARIE: I have no difficulty as long as
24 the Court agrees as apparently you do, that count 2
25 kind of stands by itself. There is no question of

1 the parallel extortion crime. There was a receipt
2 of money. Attempting to extort. The crime is in
3 agreement. I have no problem whatsoever.

4 All I am now saying is with respect to the
5 Government's interest in going to the Circuit now
6 as we leave the Court I think the Government is best
7 served in preserving in the best form the jury verdict
8 of all five counts returned on this basis, I think.

9 THE COURT: It seems to me I oughtn't avoid
10 a difficult decision. I will make the decision and
11 if I am wrong the Court of Appeals will reverse it.

12 The Government isn't prejudiced because the
13 Court of Appeals can order me to reinstate counts 3
14 and 5 if I am wrong. I'm not going to dispute it
15 on the grounds they didn't prove that you didn't
16 prove beyond a reasonable doubt the crime, because
17 I believe you have proved beyond a reasonable doubt
18 every one of the counts of this indictment.

19 I'm denying the defendant's motion for a new
20 trial on the grounds of lack of evidence. I'm denying
21 the defendant's motion for a new trial on the grounds
22 of mistakes in the admissions of evidence under the
23 hearsay rule.

24 I will issue a memorandum to support that
25 position shortly.

1 MR. DEARIE: I suggest --

2 THE COURT: What I would like to do is to
3 sentence Mr. Iaconetti under counts 1, 2 and 4.
4 Dismiss 3 and 5 under condition that the Government
5 may move to reinstate the verdict, should it be
6 possible to do so after an appeal.

7 I will also say that my sentence will be the
8 same with 1, 2 and 4 as to 3 and 5. All are valid,
9 whether 3 and 4 are invalid I don't know. That is
10 if he had been convicted on any count my sentence
11 would have been identical. The other counts would
12 have been concurrent.

13 So there is no need for the Court of Appeals
14 to send this back for resentencing because the
15 evidence was the same and would have been the same
16 no matter how he had been charged.

17 Under those terms therefore I dismiss 3 and 5
18 without prejudice.

19 This is a serious crime. The defendant has
20 been convicted by a jury verdict and compelled to
21 accept that jury verdict as being an accurate verdict.

22 MR. Iaconetti, you have the right to appeal
23 from this judgment I am about to enter. If you are
24 unable to pay the cost of an appeal you have the right
25 to appeal in the forma pauperis.

COURT'S MEMORANDUM AND ORDER DENYING DEFENDANT'S
MOTION FOR A NEW TRIAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x

UNITED STATES,

Plaintiff,

75 CR 277

- against -

MEMORANDUM
and
ORDER

HARRY DOMINICK IACONETTI,

Defendant.

----- -x

APPEARANCES:

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United States Attorney
Eastern District of New York

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Assistant United States Attorney
For Government

LEON DICKER, Esq.
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For Defendant

WEINSTEIN, D. J.

The defendant, Harry D. Iaconetti, a federal government contract inspector, was found guilty by a jury of soliciting and accepting a bribe (18 U.S.C. § 201(c)) and attempting to extort money (18 U.S.C. § 1951) from two government suppliers. He moves for a new trial on the

ground that the verdict rested upon inadmissible rebuttal evidence by two government witnesses. For the reasons stated below, the court finds the evidence relevant, non-prejudicial and admissible under the hearsay rules.

I. Facts

The government's chief witness against the defendant was Mr. Lioi, an officer in a corporation seeking a government contract. Mr. Lioi testified that on February 10, 1975, the defendant told him that it would be "hard to justify" a favorable pre-award survey, a prerequisite to the awarding of a contract, unless 1% of the contract price were paid to the defendant and "upper echelons" in the government. After the defendant requested the bribe, Mr. Lioi discussed it with his partners and counsel for the corporation, contacted the FBI, and arranged for future conversations with the defendant to be secretly recorded. As a result, a significant portion of the government's case consisted of tapes of the conversations between Mr. Lioi and the defendant on February 11 and 24, of 1975.

To rebut the government's case, the defendant relied primarily on his own testimony. He denied each

government witness' version of their unrecorded conversations with him. Furthermore, he testified that instead of requesting a bribe from Mr. Lioi on February 10, he was offered an unsolicited bribe of \$1,000 by Mr. Lioi despite his repeated assurances that the contract would be awarded to the firm. He explained the tapes as recordings of conversations in which he was "leading . . . on" Mr. Lioi in order to "gather evidence".

One other explanation by the defendant of his conduct was revealed on his cross-examination by the government. Immediately after his arrest, with the money in his possession, the defendant had told the FBI that the bribery discussions with Mr. Lioi had been a joke. The defendant testified as follows:

"Q In fact, you told the FBI, Mr. Iaconetti, that the entire unfortunate incident was a practical joke, didn't you?

A I said it started out like a practical joke.

Q You didn't tell the FBI that the whole matter was a practical joke and that you had a reputation for being a practical joker, and this was one of your practical jokes that got out of hand? Isn't that what you told the --

A Yes, I said that to [Special Agent] Chandler I believe."

Because of the conflicting interpretations that could be given portions of the tapes, because understanding the taped discussions depends in part on what happened at the February 10th meeting, and because the defendant flatly contradicted Mr. Lioi's version of the meeting on the 10th, the government presented two rebuttal witnesses. The witnesses related Mr. Lioi's reports to them on the 10th of the defendant's statements earlier that day, thus substantiating Mr. Lioi's testimony that the defendant had solicited a bribe. The witnesses were Mr. Goldman, a business partner of Mr. Lioi, and Mr. Stern, the attorney for the firm.

Mr. Stern testified on direct examination as follows:

"Mr. Lioi said that an individual from GSA had been in the factory that day and that the individual had been there for purposes of doing a pre-award survey with regard to a contract that [the firm] had bid on.

This individual had at one point in the day asked him directly for money. I believe the amount was \$12,000 [approximately 1% of the contract]. And that that money was to feather the bed and give [the firm] that contract. . . . He also said that the man offered him a deal with regard to future contracts."

Defendant made a timely objection to the testimony of these two witnesses; the ground stated was that the testimony was prejudicial inadmissible hearsay. Federal Rules of Evidence, Rule 103(a)(1).

II. Relevancy

Rules 401 to 403 of the Federal Rules of Evidence require that evidence be relevant and that its relevance not be outweighed by unfair prejudice. Rule 401 defines relevant evidence as tending to affect the probability of a proposition of fact a party must establish. It reads:

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The testimony of the two rebuttal witnesses meets the relevancy test of Rule 401. It is highly probative of a material fact in the case, that is, that the defendant solicited a bribe from Mr. Lioi on February 10th, as charged in the indictment. Evidence that Mr. Lioi contacted a business partner and the attorney for the corporation shortly after his meeting with the defendant makes it

more probable that something of consequence to the business occurred during the meeting with the defendant. It would be imperative to consult with a business partner after any discussion of a bribe in order to determine how to meet what might be a business crisis. The evidence showed that loss of this contract would have adversely affected the company. Once it was decided to resist, the corporation counsel's advice would be necessary in deciding how to act.

The testimony of these two witnesses as to the content of Mr. Lioi's communication with them also had an important bearing on the jury's evaluation of witnesses' credibility. The rebuttal evidence makes it more likely that Mr. Lioi's version of the February 10th meeting with the defendant was accurate rather than the defendant's testimony that Mr. Lioi was actively seeking to bribe him. Confirmatory evidence is relevant since it aids the jury in evaluating the probative force of other evidence offered to prove a material fact. Mr. Lioi's testimony was crucial with respect to not only the events of the 10th, but also those of the days intervening to the defendant's arrest on the 24th. It set the framework for the tape recorded

conversations and helped to explain the tone of those conversations. Thus, the rebuttal evidence is relevant as directly probative of a material fact and as a reinforcement of the credibility of a key witness.

Despite the fact that the evidence is relevant, it may be excluded in the trial court's discretion if its negative, prejudicial consequences outweigh the probative value. As Rule 403 provides:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

None of the factors listed in Rule 403 overbalances the probative force of the evidence. The prejudicial effect of the evidence was not significant. The jury had already heard that the defendant had solicited a bribe on February 10th. The emotional impact of hearing two brief confirmations of the solicitation was negligible. Furthermore, since the rebuttal testimony was restricted, by direction of the court, to repetition of the defendant's statements to Mr. Lioi, as related by Mr. Lioi to the witnesses, there was no

confusion, delay, or waste of time.

III. Hearsay

Goldman's and Stern's testimony would traditionally have been characterized as hearsay. They repeated the extra judicial declarations of Lioi relating what the defendant said to prove what defendant said. This is hearsay under Rules 801(a)(b) and (c) of the Federal Rules of Evidence reading:

"Rule 801 Definitions

The following definitions apply under this article:

- (a) Statement. A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.
- (b) Declarant. A 'declarant' is a person who makes a statement.
- (c) Hearsay. 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Exceptions to this rule provide ^{three}~~four~~ independent routes by which the rebuttal witnesses' reports of Mr. Lioi's out of court statements to them may be admitted as evidence in chief.

A. Consistent testimony to rebut
charge of fabrication

Under Rule 801(d)(1)(B) prior consistent statements of a witness testifying and subject to cross-examination concerning his statements are not hearsay when offered under certain circumstances to support credibility. It reads:

"(d) Statements which are not hearsay.
A statement is not hearsay if-
(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. . . ."

The rebuttal evidence meets the three conditions of Rule 801(d)(1)(B). First, the declarant, Mr. Lioi, testified at the trial and was subject to cross-examination about the February 10th meeting. Second, Mr. Goldman's and Mr. Stern's testimony was consistent with Mr. Lioi's testimony about the defendant's solicitation of a bribe. Third, the evidence rebutted an implied charge of improper motive. The defendant's account of his February 10th conversation with Mr. Lioi contradicted Mr. Lioi's account both in matters of major importance and in details. The total variance between the two accounts of the February 10th conversation is

sufficient to constitute an implied claim by the defendant that Mr. Lioi lied because of improper motive. The defendant also expressly suggested on the witness stand that Mr. Lioi fabricated the idea of the defendant's seeking a bribe for the improper motive of covering up the fact that Mr. Lioi himself had attempted to bribe the defendant.

B. Admission of defendant

The evidence may be considered an admission by the defendant under an agency theory and therefore admissible under Rule 801(d)(2)(C):

"(d) Statements which are not hearsay.
A statement is not hearsay if . . .
(2) Admission by party-opponent. The statement is offered against a party and is . . . (C) a statement by a person authorized by him to make a statement concerning the subject. . . ."

From the other evidence in the case, including the transcripts of February 11 and 24, the court finds as a predicate for admissibility pursuant to Rule 104(a), that the defendant requested a bribe from Mr. Lioi on February 10th and authorized him to confer with his associates in order to get their permission to pay that bribe. He was fully aware of the organization of the business and knew

that Mr. Lioi could not make the large payment demanded without the permission of his business associates. To demand a bribe was, therefore, to authorize those who ran the business to discuss the demand. Mr. Lioi's repetition of the defendant's solicitation is, as a result, an authorized statement, an admission by a party.

C. Reliable and necessary hearsay

The Federal Rules of Evidence codify an open-ended exception for reliable and necessary hearsay. Its use requires careful exercise of judicial discretion and the satisfaction of precise criteria. It reads:

"Rule 803. Hearsay Exceptions: Availability of Declarant Immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

"However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant."

The first requirement of Rule 803(24) is that there be "circumstantial guarantees of trustworthiness" equivalent to those for the enumerated hearsay exceptions. The declarant was available for cross-examination. The fact that the statement was made close on the heels of the criminal event and to persons with whom it was appropriate and even necessary to communicate would seem to minimize the risks of insincerity and faulty memory. The quality of the facts cited as insuring reliability for the first twenty-three hearsay exceptions range over an entire spectrum. The factors present here are certainly equivalent in reliability to those of many of the other exceptions and superior to some. We prefer not to rest on the state of mind exception, Rule 803(3), even though United States v. Annunziato, 293 F.2d 373, cert. denied, 368 U.S. 919, 82 S.Ct. 240, 7 L.Ed.2d 134 (1961), in circumstances much like those before us, admitted hearsay on that theory.

That case probably went beyond the limits of Rule 803(3) by allowing "a statement of memory or belief to prove the fact remembered or believed." Shepard v. United States, 290 U.S. 96, 106, 54 S.Ct. 22, 26, 78 L.Ed. 196, 203 (1933); United States v. Kennedy, 291 F.2d 457, 459 (2d Cir. 1961).

The second requirement of the Rule is that the "statement [was] offered as evidence of a material fact." Rule 803(24)(A). This requirement seems redundant since, if it did not tend to prove or disprove a material fact, the evidence would not be relevant and would not be admissible under Rules 401 and 402. What is probably meant is that the exception should not be used for trivial or collateral matters. The discussion of the probative value of the evidence for the purpose of meeting the requirements of Rule 401 makes it clear that the evidence is relevant to a material proposition of fact in the case and is of great importance.

Rule 803(24)(B) requires that the "statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." The testimony of the two rebuttal witnesses is the most powerful evidence of what was said in view

of the straight conflict between the chief witness for the prosecution, Mr. Lioi, and the defendant, with respect to what happened on the critical date of February 10th. Furthermore, the testimony not only casts light on what was said, but also on how it was said. This is important because of the statement of the defendant to the FBI that the bribery discussion was all a joke. Thus, the meaning of the words used by the defendant on February 10, the critical date, depends to a considerable extent on body motions and whether defendant was laughing or winking, whether his tone of voice would give color and meaning to words which otherwise would be neutral. Even the words, "I don't want to take a bribe and will not take one," said with a wink and a smile might well be interpreted to mean exactly the opposite. Evidence of Mr. Lioi's response to the February 10th conversation is in the final analysis the best available to resolve doubt about what actually occurred between the defendant and Mr. Lioi.

In addition, "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." Federal Rules of Evidence, Rule 803(24)(C). There is a clear conflict of credibility. The jury was entitled to all the help available on the point.

Finally, the government gave the defendant ample notice of the intention to offer the statement. Notice was given midway through the defendant's testimony, five days before the rebuttal witnesses were called. Defendant did not request a continuance or make any reference to an inability to adequately prepare to meet the testimony of the new witnesses. Although notice was not given in advance of trial, as required by the language of the Rule, allowance must be made for situations like this in which the need did not become apparent until after the trial had commenced. Since it was not the proponent's fault that notice could only be given after the trial began, and since the defendant was not prejudiced by the mid-trial notice, the evidence was properly admitted under Rule 803(24).

IV. Presentation on Rebuttal

The court has broad powers to control the mode and order of interrogating witnesses. Federal Rules of Evidence, Rule 611(a). Presentation on rebuttal, after the defendant had testified, rather than as part of the government's direct case, was appropriate and desirable.

V. Conclusion

The rebuttal evidence was properly admitted. It was necessary so "that the truth may be ascertained and proceedings justly determined," as required by the fundamental rule of interpretation of the Federal Rules of Evidence, Rule 102.

The motion for a new trial is denied.

So ORDERED.

Dated: Brooklyn, New York
January 8, 1976

U. S. D. J.

JUDGMENT OF CONVICTION OF DEFENDANT

United States of America vs.

United States District Court for

EASTERN DISTRICT OF NEW YORK

DEFENDANT

M'FILED

HARRY DOMINICK IACONETTI

DOCKET NO.

75 CR 277

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this dateMONTH DAY YEAR
1 7 1976

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Leon Dicker, Esq.

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,☐ NOLO CONTENDERE,☐ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged☒ GUILTY. counts 1 to 5 incl.

M'FILED

FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of violating T-18, U.S.C. Secs. 201(c), T-18, U.S.C. Sec. 1951, in that from on or about and between Oct. 15, 1974 up to and including Feb. 24, 1975, both dates being approximate and inclusive, the defendant, did knowingly, wilfully, unlawfully, and knowingly attempt to obstruct, delay and affect commerce and the movement of articles by attempting extortion in that the defendant attempted to obtain a sum of money not due him or his office, being a public official, as defined in Sec. 201(a)

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 4 years on each of counts 1, 2 and 4 to run concurrently. Stay of execution of sentence granted pending appeal

SENTENCE
OR
PROBATION
ORDERSPECIAL
CONDITIONS
OF
PROBATIONADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☐ U.S. District Judge☐ U.S. Magistrate

BEST COPY AVAILABLE

Date Jan 7 1976

NOTICE OF APPEAL TO UNITED STATES COURT OF APPEALS-SECOND CIRCUIT
 UNITED STATES DISTRICT COURT
 UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

HARRY D. IACONETTI,

Defendant.

Docket Number 75-CR-277

Jack B. Weinstein
 (District Court Judge)

NOTICE OF APPEAL

Notice is hereby given that Harry D. Iaconetti appeals to
 the United States Court of Appeals for the Second Circuit from the ☒ Judgment ☐ order ☐ other
 (specify) and conviction entered in this action on January 7, 1976

(Date)

Leon Dicker
 (Counsel for Appellant) LEON DICKER

Address 400 Madison Avenue
New York, N. Y. 10017

Date January 8, 1976

To: Appeals Clerk

United States District Court
 Eastern District of New York

Phone Number (212) 421-3400

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY)

TRANSCRIPT INFORMATION - FORM B

▶ **QUESTIONNAIRE**

▶ **TRANSCRIPT ORDER**

▶ DESCRIPTION OF PROCEEDINGS
 FOR WHICH TRANSCRIPT IS
 REQUIRED (INCLUDE DATE).

☐ I am ordering a transcript

☒ I am not ordering a transcript

Reason:

☒ Daily copy is available

☐ U.S. Attorney has placed order

☐ Other. Attach explanation

Prepare transcript of

☐ Pre-trial proceedings

☐ Trial

☒ Sentence

☐ Post-trial proceedings

January 7, 1976

The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of
 the transcript. (FRAP 10(b)) ▶ Method of payment ☐ Funds ☐ CJA Form 21

ATTORNEY'S signature

Leon Dicker

DATE

January 8, 1976

▶ **COURT REPORTER ACKNOWLEDGEMENT**

To be completed by Court Reporter and
 forwarded to Court of Appeals.

Date order received

Estimated completion date

Estimated number
 of pages.

Date _____

Signature _____

(Court Reporter)

ORIGINAL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Dean Miller, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 2 Charlton St
Apt #511 10014 New York N.Y.

That on the 19th day of MARCH, 1976,
deponent personally served the within APPELLANT'S APPENDIX

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 1 true copies of same with a duly
authorized person at their designated office.

~~By depositing~~ true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

DAVID G. TRAGER ESQ.
U.S. ATTORNEY - FOR EASTERN DISTRICT OF NEW YORK
ATTORNEY FOR PLAINTIFF-APPELLEE
U.S. COURT HOUSE
225 CADMAN PLAZA EAST
BROOKLYN, N.Y.

Sworn to before me this

19th day of March, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978

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